PETITION UNDER 28 U.S.C.§ 2254

FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court **Six Circuit Southern District of Ohio Western Division**

Name: **Buddy Struckman** Prisoner No. **744572** Case. No. **1:20-cv-00737**

Place of Confinement: Richland Correctional Institution, Mansfield, Ohio

Name of Petitioner Name of Respondent

BUDDY STRUCKMAN **V.** **(Warden, Richland Correctional Institution)**

The Attorney General of the State of Ohio

PETITION

1. (a) Name and location of Court that entered the judgment of conviction you are challenging:

Hamilton County Court of Common Pleas, Cincinnati, Ohio; Judge Leslie Ghiz

(b) Criminal docket or case number: B1502231

RECEIVED
MAR - 6 2024
RICHARD W. NAGEL
Clerk Of Court
CINCINNATI, OHIO

2. (a) Date of the judgment of conviction: May 22,2018

(b) Date of sentencing: May 22,2018

3. Length of sentence: 7 years. O.D.R.C.

4. In this case were you convicted on more than one count or of more than one crime? Yes

5. Identify all crimes of which you were convicted and sentenced in this case:

R.C. 2923.17(A) unlawful possession dangerous ordnance x2

R.C. 2941.144 specification x2

6. (a) What was your plea? Not Guilty

(b) If you entered a guilty plea to one count or charge and not guilty to another count or charge, what did you plead guilty to and what did you plead not guilty? NA

(c) If you went to trial, what kind of trial did you have? Jury

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? Yes (Pretrial)

8. Did you appeal from the judgment of conviction? YES

9. If you appealed, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket or case number: C-180287

(c) Result: Affirmed (see attached exhibit J)

(d) Date of result: March 31, 2020

(e) Citation to the case: State v Struckman 2020 Ohio app. Lexis 1187

(f) Grounds raised: Citing *McIntosh v. Hudson*,632 F.Supp.2d 725.

(1) U.S. Constitution Amendment V, Requirement of Proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process. U.S. Constitution Amendment XIV, Insufficient Evidence Due Process, Fundamental Right, Substantive Due Process Equal Protections Clause.

(1) The Judgement was based on insufficient evidence and was contrary to law.

(2) U.S. Constitution Amendment V, Due Process, Fair Trial, Fundamental Error. U.S. Constitution VI, Plain Error, Right to Counsel, Fundamental Error.

(2) Mr. Struckman was deprived of his right to counsel under Sixth Amendment to the United States Constitution when his request for counsel during trial was denied

(3) Competency, U.S. Constitution Amendment V, Requirement of Proof Beyond Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process

(3) The trial court abused its discretion in finding Mr. Struckman competent to stand trial.

(g) Did you seek further review by a higher state court? YES

If yes, answer the following:

(1) Name of court: Supreme Court of Ohio

(2) Docket or case number: 20-0594, Gen-2020-0594

(3) Result: Jurisdiction denied

(4) Date of result: July 21, 2020

(5) Citation to the case: State v Struckman 2020-Ohio-3712

(6) Grounds raised:

(1) U.S.Constitution Amendment V, Requirement of Proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process.

U.S. Constitution Amendment XIV, Insufficient Evidence Due Process, Fundamental Right, Substantive Due Process Equal Protections Clause.

(I) Constructive knowledge is insufficient to fulfill knowingly element under R.C.2923.17(A).
(II)R.C. 2901.21(A)(2) requires requisite degree of culpability to prove knowingly in R.C.2923.17(A).
(III) R.C.2923.17(A) requires access to be proven.
(IV) R.C.2923.17(A). Constructive possessions "control-over" element standing alone cannot prove the ready at hand or under his "under-control" element to fulfill the specification in R.C.2941.144.
(V) R.C.2941.144 requires "on or about his person" and "ready at hand or under his control" to be met to prove R.C.2941.144.

(2) U.S,Constitution Amendment V, Due Process, Fair Trial, Fundamental Error.

U.S. Constitution Amendment VI, Due Process, Plain Error, Right to Counsel, Fundamental Error. U.S. Constitution XIV, Substantive Due Process, Equal Protections Clause.

(VI) A defendant cannot simple wear out the individual right to counsel or the requirement under Crim.R.44(C) each and every time counsel stands down.
(VII) Crim.R.44(C) does not permit presumption of waiver of counsel.

(3) Competency, U.S. Constitution Amendment V, Requirement of Proof Beyond Reasonable Doubt, Fair Trial, Plain Error, Fundamental Error

U.S. Constitution Amendment XIV, Substantive Due Process, Equal Protection Clause, Due Course of Law.

(VIII) The lower courts ignoring competency stipulations and failing to notice lack of competence to stand trial is abuse of discretion.

(h) Did you file a petition for certiorari in the United States Supreme Court? NO

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? YES

11. (a) if your answer to Question 10 was "Yes," give the following information:

(1) Name of the court: Ohio First District Court of Appeals

(2) Docket or case number: C-180287

(3) Date of filing: Information Missing on the Case Docket

(4) Nature of the proceeding: 26(B) Application for Reopening

(5) Grounds raised:

(a) U.S. Constitution Amendment V, Fundamental Due Process, Fair Presentment.
U.S. Constitution Amendment IV, Illegal Search Seizure, Due Process.
U.S. Constitution Amendment VI, Right to Effective Counsel, Plain Error, Fundamental Error.

(1) The evidence at trial does not fully support the jury's finding of knowingly to prove guilt.
(2) Prosecutorial misconduct, cumulative improper inferences not sufficient to prove guilt
(3) Violation of Fourth Amendment, Article 1 Section 14 of the Ohio Constitution Unreasonable searches and seizures, court erred in denying motion to suppress.
(4) Trial Court erred in denying Motion in Limine, denying objections, failed to protect Defendant and limit the admissibility of prejudicial evidence, questions and statements.

(b) Appellant counsel's fundamental error by refusing to correct errant facts in appellant brief and not attempting to correct prosecutor's errant facts in briefs, citing McCarthy v. Pollard 656 F.3d 478.

(6) Did you receive a hearing where evidence was given on your petition, application? Or motion? YES

(7) Result: Entry Denying 26(B) Application for Reopening

(8) Date of result: Feb. 03, 2021

12. (a) If you filed any additional petition, application, or motion, give the same information:

(1) Name of the court: Hamilton County Court of Common Pleas, Cincinnati , Ohio; Leslie Ghiz

(2) Docket or case number: Trial B1502231

(3) Date of filing: 8-21-18

(4) Nature of the proceeding: Motion for Leave Crim.R.33

(5) Grounds raised:

(1) U.S. Constitution Amendment V, Requirement of proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process, Fair Presentment. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83. U.S. Constitution XIV, Due Process, Fundamental Right. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? YES

(7) Result: Overruled Motion for Leave Crim.R.33

(8) Date of result: 9-17-18

(9) Did you seek further review by a higher state court? YES

If yes, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket of case number: C-200210

(c) Result: Dismissed

(d) Date of result: 3-31-21

(e) Citation to case: State v Struckman 2021-ohio-1043

(f) Grounds Raised: Same as 12. (a)(5) Grounds raised

(g) Did you file a petition for certiorari in United States Supreme Court? NO

(h) Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? YES

13. (b) If your answer to Question 12. (a)(9)(h) was "Yes," give the following information:

(1) Name of the court: Hamilton County Court of Common Pleas, Cincinnati , Ohio; Leslie Ghiz

(2) Docket or case number: Trial B1502231

(3) Date of filing: 9-29-20

(4) Nature of the proceeding: Motion for Leave Crim.R.33 New Evidence

(5) Grounds raised:

(1) U.S. Constitution Amendment V, Requirement of proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process, Fair Presentment. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83. U.S. Constitution XIV, Due Process, Fundamental Right. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83.

(1) Trial court erred in denial of Crim.R.33 Motion which put forth trial courts err in motion Limine, denial of objections by defense, courts failure to protect defendant's Constitutional rights to a fair trial, protect defendant from double jeopardy, prejudicial evidence.

(2) U.S. Constitution Amendment V, Requirement of proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process,

Fair Presentment. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83.

U.S. Constitution XIV, Due Process, Fundamental Right.

Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 us 83.

(2) Prosecutorial misconduct, cumulative improper inferences prejudiced defendant to a fair trial, issues brought in defendants Crim.R.33.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? YES

(7) Result: Entry overruling Motion for Leave Crim.R.33 New Evidence

(8) Date of result: 10-26-2020

(9) Did you seek further review by a higher state court? YES

If yes, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket of case number: C-200216

(c) Result: Dismissed

(d) Date of result: 6-17-21

(e) Citation to case: NA

(f) Grounds Raised: Same as 13. (b)(5) Grounds raised

(g) Did you file a petition for certiorari in United States Supreme Court? NO

(h) Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? YES

14. (c) If your answer to Question 13. (b)(9)(h) was "Yes," give the following information:

(1) Name of the court: Hamilton County Court of Common Pleas, Cincinnati , Ohio; Leslie Ghiz

(2) Docket of case number: Trial B1502231

(3) Date of filing: 10-05-2022

(4) Nature of the proceeding: Motion for Leave Crim.R.33 New Evidence

(5) Grounds raised:

(1) U.S. Constitution Amendment V, XIV, Due Process, Fair Trial, Double Jeopardy, Plain Error, Reasonable Doubt.

(1) Common pleas court unreasonably failed to fully and fairly review the unavoidable-prevention standard in their operative fact finding opportunity under Crim.R.33(B).

(2) U.S. Constitutional Amendment X, Separation of Powers, Due Process, Fair Trial Plain Error.

(2) Common pleas court abused discretion in denying movants summary judgment and in failing to require respondent show excusable neglect under Civ.R.6(B)

(3) U.S. Constitutional Amendment V, Reasonable Doubt, Fair Trial, Plain Error, Due Process, Double Jeopardy.

U.S. Constitution Amendment XIV, Due Process, Fundamental Right, Equal Protections, Miscarriage of Justice, *Giglio v. United States* 405 u.s. 150

(3) Common pleas court adjudication was fundamental error and is contrary to Clearly Established Federal Law because it constitutes an unreasonable application in identification of the issues from the acquittal municipal case as it relates to this common pleas case.

(6) Did you receive a hearing where evidence was given on your petition application, or motion? YES

(7) Result: Entry denying Motion for Leave Crim.R.33 New Evidence

(8) Date of result: 12-12-22

(9) Did you seek further review by a higher state court? YES

If yes, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket of case number: C-220658

(c) Result: Affirmed

(d) Date of result: 10-4-23

(e) Citation to case: State v Struckman 2023-ohio-3582

(f) Grounds Raised: Same as 14. (c)(5) Grounds raised

(g) Did you file a petition for certiorari in United States Supreme Court? NO

(h) Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? YES

15. (d) If your answer to Question 14. (c)(9)(h) was "Yes," give the following information:

(1) Name of the court: Hamilton County Court of Common Pleas, Cincinnati , Ohio; Leslie Ghiz

(2) Docket or case number: Trial B1502231

(3) Date of filing: 11-18-19, 11-22-19

(4) Nature of the proceeding: Petition to Vacate or Set Aside Judgment of Conviction or sentence

(5) Grounds raised:

(1) U.S. Constitution Amendment V, Requirement of proof Beyond a

Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process, Fair Presentment.

U.S. Constitution Amendment VI, Plain Error, Right to Counsel, Fundamental Error.

U.S. Constitution VIII, U.S. Constitution XIV, Due Process, Fundamental Right.

(1) The Courts judgment was the result of an unfair trial.

(2) U.S. Constitution Amendment V, Requirement of proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process, Fair Presentment.

U.S. Constitution Amendment VI, Plain Error, Right to Counsel Advice, Fundamental Error, Failure to advise on Brady Material.

U.S. Constitution XIV, Due Process, Fundamental Right.

Competency

(2) The ineffective assistance of counsel Craig Newburger resulted in an unfair trial.

(3) U.S. Constitution Amendment IV, Illegal Search Seizure, Due process.

U.S. Constitution Amendment V, Fair Trial, Plain Error, Fundamental Due Process.

U.S. Constitution Amendment VI, Plain Error, Ineffective Counsel, Fundamental Error.

U.S. Constitution VIII, U.S. Constitution XIV, Due Process, Fundamental Right, Equal Protections.

(3) The ineffective assistance failure to raise a claim by counsel Bradly Hoyt resulted in an unfair trial.

(4) U.S. Constitution Amendment V, Fair Trial, Plain Error, Fundamental Due Process.

U.S. Constitution XIV, Due Process, Fundamental Right.

(4) The defendant was denied equal protections and due process as guaranteed by the Ohio Constitution and the Constitution of the United States.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? YES

(7) Result: Entry denying Petition to Vacate or Set Aside Judgment of Conviction or sentence

(8) Date of result: 12-10-2019

(9) Did you seek further review by a higher state court? YES

If yes, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket of case number: C-200069

(c) Result: Affirmed

(d) Date of result: 3-31-21

(e) Citation to case: State v Struckman 2021-ohio-1043

(f) Grounds Raised: Same as 15. (d)(5) Grounds raised

(g) Did you file a petition for certiorari in United States Supreme Court? NO

(h) Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? YES

16. (e) If your answer to Question 15. (d)(9)(h) was "Yes," give the following information:

(1) Name of the court: Hamilton County Court of Common Pleas, Cincinnati , Ohio; Leslie Ghiz

(2) Docket or case number: Trial B1502231

(3) Date of filing: 7-19-21, 9-22-21

(4) Nature of the proceeding: Petition to Vacate or Set Aside Judgment of Conviction or sentence

(5) Grounds raised:

(1) U.S. Constitution Amendment V, Reasonable Doubt, Fair Trial, Plain Error, Due Process, Double Jeopardy.

U.S. Constitution Amendment XIV, Due Process, Fundamental Right, Equal Protections, Miscarriage of Justice, Brady v Maryland 373 u.s. 83.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? YES

(7) Result: Entry dismissing / Granting prosecutors motion

(8) Date of result: 10-21-21

(9) Did you seek further review by a higher state court? YES

If yes, answer the following:

(a) Name of court: Ohio First District Court of Appeals

(b) Docket of case number: C-210640

(c) Result: Affirmed

(d) Date of result: 8-17-22

(e) Citation to case: State v Struckman 2022-ohio-2848

(f) Grounds Raised: Same as 16. (e)(5) Grounds raised

(g) Did you file a petition for certiorari in United States Supreme Court? NO

GROUND ONE: Supporting facts

May 2, 2018 Struckman was convicted of unlawful possession of a dangerous ordnance with specifications x2 by the use of prejudicial speculation of circumstantial evidence. Struckman was charged with actual possession of an automatic M-10 firearm with a specification alleging that he used a suppressor with the firearm in the possession offense.

The charges came from a warrant to search which yielded the dangerous ordnances along with marijuana, the warrant to search came from menacing / inducing panic allegations # 1 case C/15/CRB/9541 which was dismissed in 2017, moreover resulted in U.S. District Civil Complaint 1:17-cv-00543. The marijuana allegation # 2 case C/15/CRB/10112 was acquitted not guilty showing reasonable doubt exist on July 12, 2017, moreover resulted in U.S. District Civil Complaint 1:17-cv-00828. The dangerous ordnance with specifications allegations # 3 case B1502231 resulted in conviction May 2, 2018. A single affidavit administered on 4-20-2015 (D110372440A) resulted in the three aforementioned cases, prosecutions were separated. The charging information was subjected to adversarial testing. Jury instructions show the state did not have a limiting instruction on constructive possession theory or sole exclusive dominion and control. The jury instructions had option to multiple theories of guilt of possession, the jury could have found the basis for the guilty verdict on a multitude of those theories of possession (see pt. 1-6 jury instructions), constructive possession is only one of those theories.

Pretrial the State attempted a plea agreement of time served with elimination of the aforementioned civil complaints. At trial B1502231 Struckman did not testify and his evidence from the # 2 case C/15/CRB/10112 was "mooted" Struckman was told by the court "you don't get that right" "you're not in double jeopardy" Struckman's exculpatory evidence showing

reasonable doubt exist was prevented from becoming part of the record and in furtherance prevented from the record for direct appeal. The State of Ohio has been aware "con'usant" reasonable doubt existed since July 12,2017 # 2 case C/15/CRB/10112 was acquitted. At trial Struckman proved: he was not conscious of the dangerous ordnances, he never had access to the locked safe, he never had exclusive access to the house or premises or had placed the items in the safe or placed the safe in the closet. No one ever saw Struckman with the M-10 ordnance. Ohio courts failed to consider all trial exhibits.By the close of trial, the State saw the weakness in their case and altered their strategy. In closing arguments, the State argued never seeing anyone else at the residence, the State believes Struckman was a resident and by being a resident he was in possession. That argument is an actual possession theory. The State believes the suppressor was being used with the automatic weapon. The State highlighted the consequence as if the suppressor was being used or possessed (dual theories) or in use with the M-10. That is another actual possession theory. The State then shifts to constructive possession theory stating "we don't have to prove he touched or held the evidence" "just have to show dominion or control over it". The State referring to Struckman living at the house was intended to imply an actual possession theory. Case B1502231 Transcripts page 1261 show dual theories of actual and constructive possession.

On appeal the State cited case law which compared very dissimilar characteristics as Struckman's case, the state cited *Jackson* 2014-ohio-5008, *Easterly* 2011-ohio-215, *Baily* 2007-ohio-2014, *Brown* 2013-ohio2720, and *Williams* 2011-ohio-6267, none of which were completely based off circumstantial speculations, none of which had a locked safe involved, and at least three of the cases had positive gunshot residue or dna on the firearms which they

were found with in actual possession nothing alike to Struckman's case. The First Appellate District used the same set of aforementioned citations only to add *Finnell* 2015-Ohio-4842 which had no locked safe and had an occupant testimony placing the firearm in *Finnell*'s constructive possession alike as to *Williams* supra, nothing alike to Struckman. In using the aforementioned citations, the First Appellate District stated in direct appeal judgment C-180287 at ¶14 "officers had never seen anyone else at the house" and ¶ 17 "circumstantial evidence showing that Struckman was the only person who exercised dominion and control over the area where dangerous ordnances were found and that he would have been conscious of their presence", *** "the state also presented circumstantial evidence to show that Struckman had an automatic firearm and a suppressor under his control while committing the offenses". The courts findings conflict with appellant's appeal brief produced by counsel David Hoffmann whereas he very specifically instructs reviewing courts how to properly equate the possession theory elements. It is apparent a full and constitutionally fair analysis was not completed by the state court. Their findings are an objectively unreasonable determination of the facts while their findings sponsor deceptive misrepresentations into the record. The state prosecutor is knowingly conscious about the exculpatory ultimate facts showing actual innocence and reasonable doubt exist since the July 12,2017 acquittal of the marijuana allegation #2 case C/15/CRB/10112 while they misled the appeal courts. Furthermore, multiple possession theories were introduced through the jury instructions. The state should have requested a limiting instruction specific to the type of possession they intended to prove. Because the states inability to prove a distinct possession theory beyond a reasonable doubt the state affected the jury with unclear arrangement of multiple complicated theories

of possession which misled the jury and the First Appellate District into an unclear decision which does not align with the basic principles of the United States Constitution.

Furthermore, the First Appellate District should know how important the colloquy related to the waiver of counsel is and that Struckman cannot simply agree to move forward as their presumption that he fully understands. Their assumption that a colloquy doesn't need to meet a constitutional requirement that a defendant fully understands and intelligently relinquishes a right is in err. The plot thickens with First Appellate District opinion in appeal C-180287 at {¶30}{¶31}{¶32} whereas prejudicial statements are made against the defense that "he blows you out of the water with regard to legal knowledge", "it told Struckman he was making "a serious mistake," that he would have a "fool for a client" and that he was "absolutely treading on dangerous waters.". The aforementioned shows this court that the trial court demonstrated that it presumed Struckman showed sufficient indicia of incompetence. Struckman scrutinizes the legal correctness of the trial court prejudgment to the United States Fifth Amendment right to a fair trial and the Sixth Amendment entitlement for a citizen to have a fair opportunity to represent themselves while the court insinuates the defendant is incompetent.

The Statements by the common pleas court disrespected the integrity of impartiality and endorses preconception in violation of a right to a full and fair review and a fair trial. Moreover, the courts first judge Metz recused himself, the courts second Judge Ghiz notified defendant the court was exceedingly busy. Having a third judge Guckenburg appointed shows the courts irregularity in the proceedings. Neither the second or third fully and fairly evaluated competency. Furthermore, Struckman was ensnared by the courts denial of full and fair discussion disclosing the relevant facts essential to a broad understanding of the whole matter

including all the transcript evidence and his lawyer's defense strategy. Struckman was then inundated with counsel's breakdown of communication consisting of handing Struckman two copies of a final transcript (T.p.1009), Struckman was unable to go over the transcript because he was not given a full and fair opportunity. In conjunction the multiple theories of possession in the misleading jury instructions denied Struckman a fair opportunity to comprehend or to plan a defense strategy. The record shows Struckman was placed under duress in akward position making him powerless to dispense with the trial court furthermore the record is indicative of his lack of ability in that he was not knowingly and voluntarily waiving his right to dispense with a lawyer's help. Therefore, the First Appellate District ruling is an objectively unreasonable determination of the facts, moreover plain error concerning equality and justice. An examination into the "point in time" Struckman was found legally unable to have a rational as well as a factual understanding of the proceedings against him Struckman was not legally competent to behest whatsoever to the court, the court in plain error is contrary to competency procedures set forth in O.R.C.5123.013 and 2945.38(B)(1)(a)(i). It is no phenomenon that judge Metz recused himself but rather a signal to plain error. Furthermore, while the hospital records were refused by a legally incompetent Struckman that did not absolve the prosecutor's duty at trial to disclose attachment H: assault Incident number 2016000004390 relative to competency hearings. It shall become clearly apparent Struckman's due process rights were violated by the state courts plain error and in their failure to recognize U.S. Constitutional standards. In conclusion, the state of Ohio courts applied a standard of their own which conflicts with the United States Constitution.

(b) If you did not exhaust your state remedies on Ground One, explain why: NA

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

Ultimately Direct appeal counsel ignored demand letters which appellant filed with the clerk thereby refused to thoroughly raise issues or thoroughly incorporate issues into the brief. Ultimately appellant counsel unreasonably neglected the issues about errant facts,"res- judicata" double jeopardy, prosecutorial misconduct, illegal search seizure, US. Constitution Amendment V, XIV.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (d)(1) is "Yes," state: Type of motion or Petition: 26(B) Application for Reopening

Name and location of the court where the motion or petition was filed:

Ohio First District Court of Appeals

Docket or case number: C-180287

Date of the court's decision: Feb. 03, 2021

Result: (See Attachment A)

Denied 26(B), Court cites failure to demonstrate a genuine issue, colorable claim

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Ohio Supreme Court

Docket or case number: NA

Date of the court's decision: 4-06-21

Result: (See Attachment A-1, A-2, A-3)

The Ohio Supreme Court Clerk made jurisdiction an issue and refused filing Motion for leave for 26(B) regardless of appeals courts failure to give notice did not allow time to toll with 26(B) although defendant was not timely serviced by the Ohio First District Court there was no consideration, also Covid quarantine had no consideration to allow leave to be filed.

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: NA

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground One:

(1) Motion for leave Crim.R.33: I, II, III.

(2) Petition to Vacate or Set Aside Judgment of Conviction: I, II.

GROUND TWO: Supporting Facts

There is currently an issue with the Hamilton County Clerk docket summary which is missing all of the 26(B) filings, Petitioner has written request letters to the clerk inquiring explanation. Petitioner has included this issue in a request to expand the record.

The Ohio First Appellate District unreasonably omitted parts of the appellee brief in its analysis of the assignments of error in the judgment entry denying 26(B) Application for reopening. Ohio First Appellate District restricted its analysis to three assignments of error when in fact there was four assignments included in appellants 26(B) brief he submitted.

Had the First Appellate District not made a critical omission in their review of the errors submitted than the prosecutorial misconduct error and argument would have been included in their analysis conclusion, also they should have noticed the plain error nexus with exhibit A-5.

As for the three assignments of error the First Appellate District did review and argued the First Appellate District unreasonably applied the *Strickland* standard to access ineffective assistance of appellate counsel when it limited its analysis of the attached exhibits. The record along with the exhibits clearly shows that appellate counsels errant facts most certainly impacted the appeal citing *McCarthy v. Pollard* 656 F.3d 478 and that appellant counsel acknowledge the impact of his mistakes. Appellant counsel's errant facts can be more than said to have prejudiced appeal brief but very clearly the record shows the errors are the basis for why the appeal brief failed. For example, appellant counsel made the mistake by his errant fact in the brief stating Petitioner had been on the second floor while in fact that was not correct and when petitioner addressed the issue the appellant counsel apologized but his apology did not correct his error. Appellant counsel realizes his contribution of errant facts caused the brief

to fail, he has given admissions and apologies in letters, the letters were attached as evidence in the 26(B) application to reopen as evidence to prove to the state court a colorable claim that appellant counsel's errors prejudiced appellant briefs. The record also shows appellants request letters were sent to appellant counsel long before his brief was finalized or submitted, the letters directed appellant counsel which issues were crucial and must be added into the appeal brief C-180287, the request letters were filed with the Hamilton County Clerk of court on 4-29-19, 6-18-19, 8-21-19, 1-29-20, and copies were mailed to appellant counsel. At no benefit to Struckman the appellant counsel refused to incorporate the arguments into the brief. The record shows Struckman's 26(B) argument attached evidence of transcript page from a suppression hearing which included the testimony of the officer Sublet who wrote the search warrant, Sublet is also the officer who took the warrant and had it signed by Judge William Mallory at the Hamilton County Court. Officer Sublet took the stand at the suppression hearing see attachment A-4 whereas he stated on record as recorded in the transcript that "in fact" the M-10 had no reasoning for the search warrant. Furthermore, it was explained to the state courts that even if the locked safe which contained the M-10 somehow cleared the particularity clause it still required an additional warrant to break open the locked safe. It was also explained the warrant came from a poisonous tree #1 case C/15/CRB/9541 inducing panic menacing which was dismissed and further resulted in U.S. Civil case 1:17-cv-00543. Therefore, because the M-10 had nothing to do with the search the particularity clause could not have satisfied the requirement of the Fourth Amend. U.S. Constitution. This argument presented to the state courts was not hypothetical but merely facts in the record that prove First Appellate District has applied a standard of their own, which conflicts with U.S. Constitution.

(b) If you did not exhaust your state remedies on Ground Two, explain why: NA

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

These were 26(B) ineffective assistance of appellate counsel claims, Appellant Counsels omissions were not part of the trial record therefore not preserved for direct review. Direct appeal counsel failed to raise issues or incorporate issues into the brief, ultimately appellant counsel unreasonably blocked the vehicle ignored the issues "res- judicata" double jeopardy, prosecutorial misconduct, illegal search seizure.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (d)(1) is "Yes," state: Type of motion or Petition: 26(B) Application for Reopening

Name and location of the court where the motion or petition was filed:

Ohio First District Court of Appeals

Docket or case number: C-180287

Date of the court's decision: Feb. 03, 2021

Result: (See Attachment A, A-4, A-5)

Denied 26(B), Court cites failure to demonstrate a genuine issue, colorable claim

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Ohio Supreme Court

Docket or case number: Ohio Supreme Court Clerk refused to file see A-2

Date of the court's decision: 4-06-21

Result: (See Attachment A-1, A-2, A-3)

The Ohio Supreme Court Clerk made jurisdiction an issue and refused filing Motion for leave 26(B), regardless of appeals courts failure to give notice rule did not allow time to toll with 26(B) so although defendant was not timely serviced by Ohio First District Court it did not matter, also Covid quarantine had no consideration for the court to allow leave to be filed.

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: NA

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Two:

(1) Motion for leave Crim.R.33: I, II, III.

(2) Petition to Vacate or Set Aside Judgment of Conviction: I, II.

GROUND THREE: Supporting facts

The State of Ohio made an objectively unreasonable determination when denying all three separate Crim.R.33 motions for leave to proceed. The State of Ohio was made aware that all defendants vehicles to bring exculpatory evidence showing innocence was being unreasonably blocked thereby preventing Petitioner from the opportunity to fair presentment of exculpatory evidence which shows reasonable doubt exist. Multiple articles of exculpatory evidence showing innocence was forced into the Crim.R.33 procedure as a direct result of ineffective appellate counsel's failure to incorporate and intentionally omitting critical assignments of errors and arguments, furthermore his use of errant facts and errors in allowing prosecutor to use errant facts. Moreover, the First Appellate Districts denial of appellants 26(B) application to reopen shows their plain error failure to fully and fairly review all the exhibits such as A-5 the trial exhibit PG acquittal entry thereby ignoring to inquire of the nexus between the cases. Petitioner was never intent on overburdening the courts with his perseverance in filings, petitioner attempted to explain to the courts that his stall and delay in filings was with cause to show his respect and patience so not to file multiple filings with similar grounds at the same time. The blockade of the exculpatory evidence showing reasonable doubt exist was initiated by the trial court and not initiated by the petitioner and it was never the intention of the petitioner since beginning trial to block evidence of his own innocence from being part of trial.

At the point at which Petitioner put forth the first motion for leave Crim.R.33 the Common Pleas court overruled the motion on 8-21-18, appealing the case turned into First Appellate Districts Case C-200210 which was dismissed for jurisdiction on 3-31-20, the court refused to toll the time and condemned Petitioners attempt to explain his stall in filings in his notice of

appeal even as Petitioner's cause was extended to covid quarantine which prejudice appellant with severe restrictions. Under the circumstances with cause of the covid pandemic the First Appellate District was unreasonable in denying leave to proceed which prejudiced appellant.

The second motion for leave Crim.R.33 was partially the direct result of First Appellate Districts denial of the first motion for leave aligned with the critical importance for multiple articles of exculpatory evidence showing innocence need to be brought before the court. Common Pleas court overruled the motion on 10-26-20, appealing the case turned into First Appellate Districts Case C-200216 which was dismissed for jurisdiction on 6-17-21, the court refused to toll the time although defendant was never timely serviced by the trial court, First Appellate District unreasonably blocked Petitioner's vehicle to bring the evidence before the court which is a manifest injustice due to the circumstances.

The third motion for leave Crim.R.33 was partially the direct result of First Appellate Districts denial of the aforementioned motions for leave. Petitioner had intentions to perfect the third motion for leave Crim.R.33 vehicle and thereby bring the evidence before the court in manner suited to their liking so that the courts attention and review may correct the injustice that has occurred. The Common Pleas court this third time filed an Entry Denying Motion for Leave Crim.R.33 on 12-12-22, appealing the case turned into First Appellate Districts Case C-220658 which was dismissed for jurisdiction on 10-04-23, the First Appellate District ruled that the judgment "*Struckman I*" which was created by the First Appellate District on 3-31-20 is not evidence and the facts contained therein was available to Petitioner at the 5-22-18 trial and he was aware of the facts at that time. Struckman argues that the facts in the judgment "*Struckman I*" was not available at trial and it was unknown at trial what the basis for the jury's

verdict was because the charging information was subjected to adversarial testing the jury instructions show the state did not have a limiting instruction on constructive possession theory or sole exclusive dominion and control moreover the jury instructions left open multiple options for the jury to deliberate on multiple theories of guilt of possession, the jury could have very well deliberated and found the basis for the guilty verdict on a multitude of the theories of possession in the jury instructions (see jury instructions "Possession"Pt.1-6), constructive possession is only one of those theories. Therefore, Struckman was unable to know the basis for the jury's verdict in deliberations without speculation and that the actual and factual information is the judgment "*Struckman I*", which shows the basis for the jury's verdict in deliberations as the 13th juror, moreover the facts therein were not available until the judgment "*Struckman I*" was produced on 3-31-20. Therefore, the First Appellate District has blocked all avenues for the claim with an erroneous determination, refusing to accept jurisdiction for a full and fair review has resulted in a miscarriage of justice. Struckman also filed a summary of judgment 11-15-22 for unreasonable hardship caused by the prosecutor's undue filings as well as an objection to the states extension of time request whereas the prosecutor misrepresented the fact that they were not notified the appellant brief was filed when in fact the record shows they were notified the appellant brief was filed in the First Appellate District court scheduling order as well as by electronic notification from the First Appellate District clerk.

When the State of Ohio dismissed the motions for leave it was an unreasonable application in the state court proceedings and was clearly erroneous and moreover Petitioner should retain the ability to state a claim for habeas relief for an "unreasonable determination of the facts." *Badelle v. Corell*, 452 F.3d 648, 654-655.

(b) If you did not exhaust your state remedies on Ground Three, explain why: NA

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

Although advisory council refused to advise on the issues, and Pro-*se* was ordered by the trial court that issues were not relevant "moot", "you don't get that right" , "this is not double jeopardy" which forced the evidence out of the record, ultimately Direct appeal counsel ignored demand letters which appellant filed with the clerk thereby refused to raise the issues or incorporate the issues into the brief, all reasonable vehicles have been blocked to bring exculpatory evidence showing innocence. Ultimately appellant counsel unreasonably neglected the issues about errant facts, "res- judicata" double jeopardy, prosecutorial misconduct, illegal search seizure, US. Constitution Amendment V, XIV.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (d)(1) is "Yes," state: Type of motion or Petition:

Motion for Leave Crim.R.33

Name and location of the court where the motion or petition was filed:

Hamilton County Court of Common Pleas, Cincinnati, Ohio; Leslie Ghiz

Docket or case number: B1502231

Date of the court's decision: 9-17-18

Result: Overruled Motion for Leave Crim.R.33

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Ohio First District Court of Appeals

Docket or case number: C-200210

Date of the court's decision: 3-31-2021

Result:(See Attachment B, A-2, A-3)

The Court of Appeals found that jurisdiction was at issue refusing excuses such as Covid quarantine lockdowns and refusing to toll the time although defendant was not timely serviced, also refused to recast appeal as motion for leave or allow extension of time to file leave.

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: NA

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Three:

(1) Sucessive Motion for leave Crim.R.33

(f) If you did not exhaust your state remedies on Ground Three, explain why: NA

(g) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

The issue was intentionally left out of the trial record by the trial court and trial courts appointed appeal counsel, the prior Crim.R.33 was unsuccessful due to defendant not

being timely serviced by the Trial Court or the Ohio First District Court and it did not matter about Covid quarantine, the courts gave no reasonable vehicle to allow leave to be filed or the matter to be heard.

(h) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (g)(1) is "Yes," state: Type of motion or Petition:

Motion for Leave Crim.R.33

Name and location of the court where the motion or petition was filed:
Hamilton County Court of Common Pleas, Cincinnati, Ohio; Leslie Ghiz

Docket or case number: B-1502231

Date of the court's decision: 10-26-20

Result: Overruled Motion for Leave Crim.R.33

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (h)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (h)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Ohio First District Court of Appeals

Docket or case number: C-200216

Date of the court's decision: 6-17-21

Result: Dismissed, refused to acknowledge Covid quarantine lockdown,(see A-2, A-3)

(7) If your answer to Question (h)(4) or (h)(5) is "No," explain why you did not raise this issue: NA

(I) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Three:

(1) Reconsideration app.r.26(a)

(2) Supreme Court of Ohio

(3) Third Motion for leave Crim.R.33

(j) If you did not exhaust your state remedies on Ground Three, explain why: NA

(k) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

The issue was unsuccessful due to defendant not being timely serviced by the Trial Court or the Ohio First District Court in the prior Crim.33 filings and prejudicially no reasonable excuse or O.D.R.C mail complaint was accepted for leave for the issues to be to be heard by the Ohio State Courts causing manifest injustice and prejudice.

(L) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (I)(1) is "Yes," state: Type of motion or Petition:

Motion for Leave Crim.R.33

Name and location of the court where the motion or petition was filed:

Hamilton County Court of Common Pleas, Cincinnati, Ohio; Leslie Ghiz

Docket or case number: B1502231

Date of the court's decision: 12-12-22

Result: Entry Denying Motion for Leave Crim.R.33

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (L)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (L)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Ohio First District Court of Appeals

Docket or case number: C-220658

Date of the court's decision: 10-04-23

Result: Affirmed (See Attachment C)

Ohio First District Court ruled that judgment "*Struckman I*" created 3-31-20 is not evidence and the facts contained therein was available at the 5-22-18 trial.

(7 If your answer to Question (L)(4) or (L)(5) is "No," explain why you did not raise this issue: NA

(m) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Three:

(1) Reconsideration app.r.26(a)

(2) Supreme Court of Ohio

(3) Petition to Vacate or Set Aside Judgment of Conviction or Sentence

(n) If you did not exhaust your state remedies on Ground Three, explain why: NA

GROUND FOUR: Supporting Facts

The petition to vacate or set aside judgment of conviction case C-220069 the trial court failed to consider all trial exhibits relevance such as attachments A-4, A-5. The docket summary shows an irregularity of the proceedings by the trial court ordering various transcripts midtrial in an off record proceeding and there is a irregularity of the proceedings shown with the trial court off record letter sent to defense counsel directing defense counsel that they will stand down midtrial, moreover irregularity in the proceedings is shown when the trial court ordered transcripts without Struckman's request and then unloaded the transcripts on Struckman midtrial thereby prejudicing Struckman's defense. The Ohio First Appellate District Opinion C-200069 entered March 31, 2021 unreasonably believes in their opinion the trial court followed procedure and places blame on Struckman for agreeing to move forward midtrial although Struckman argues the court erred by not reading the complete colloquy as well as not considering Struckmans lack of competence (citing *U.S. v Chischilly* 30 F.3d 1144) pushing a presumably incompetent Struckman forward in contrast to a move forward that had a rational and factual understanding of the proceeding. It is evident in the trial record of the irregularity of the proceedings by the trial court. The off record letter sent by the court as well as the off record trial transcripts proceeding does not confirm what the record shows in the direct appeal, the trial court could not have been committed to protect Struckmans right to due process or a fair trial by the courts action prejudicially unloading multiple trial transcripts on Struckman midtrial while pushing Struckman to be *pro se* and forcing Struckman to perceive or discern the court appointed counsel or advisory council strategy for the courts expected hybrid defense presentation (citing *Verdin v O'Leary*, 972 F.2d 1467). It is clearly apparent in the record

Struckman was rushed through the process and that Struckman was not competent to present a hybrid defense with the type of workload placed upon Struckman while furthermore there is indeed fair reason to speculate with cumulative signs to Struckmans incompetence with presumed delusional behavior in the record which would reasonably determine Struckman was incapable of presenting a defense. The Ohio First Appellate District unreasonably failed to review or identify the nexus between the off record ordered trial transcripts, the off record letter sent by the trial court to defense counsel directing defense counsel to stand down (citing *U.S. v Rezin* 322 F.3d 443) and the defendant's incompetence midtrial (citing *Chischilly* supra). Furthermore, it was never a request made from Struckman directly to the trial court for counsel to take over it was a situation midtrial on a Friday whereas advisory council turned to Struckman looking him in the eye and stated "let me take over I can win this", Struckman agreed and advisory council took over from that point as full counsel. Advisory council acting as full counsel stood up and advised the court that he took over the defense with Struckmans approval, at that point it was a done deal that advisory council then became full counsel, the court even sent the jury home and allowed everyone to leave for the day. Even if the Ohio First Appellate District believes the off record email was merely cumulative of the evidence of record that does not preclude the multitude of off record court ordered trial transcripts or the allegations of the off record arrangements made in an off record proceeding between the court and counsel whereas the record does not show Struckman was given his right to be present at that critical stage of trial. The First Appellate District March 31, 2021 opinion appears in hypocritical error placing blame on appellant counsel by stating the claims should have been brought on direct appeal while the First Appellate District was "con'usant" they had already

denied any blame on appellant counsel in The First Appellate District 26(B) entry denying application to reopen stamped filed on Feb 03,2021, therefor appellant had already been denied the direct appeal attempt by the First Appellate District. The First Appellate District continues in a defensive position blocking all appellant vehicles from the ascertainment of truth. The Ohio First Appellate District unreasonably applied res judicata to the outside evidence in support of the case C-220069 fourth claim which made the facts obvious that the allegations made in the search warrant can be shown to have reasonable doubt. The evidence certainly met some threshold standard of cogency. The evidence shows false statements material to the finding of probable cause were made in the search warrant. The Ohio First Appellate District states the argument was not "cogent" in the sense that it could not fairly be said to advance beyond mere hypothesis.

Furthermore, the successive petition to vacate or set aside judgment of conviction entry dismissing / granting prosecutors motion resulted in case C-210640 whereas at {¶7} First Appellate District states "In, fact the evidence he attaches to his petition to support his postconviction claims was available to him prior to or at his felony trial. Furthermore, C-210640 at {¶8} whereas First Appellate District states "all the evidence which Struckman submits in support of his postconvition claims was either known of made known to him at the time of his trial, and thus, he cannot not show". The First Appellate District completely overlooked and failed to consider the evidence titled exhibit J judgment "Struckman I" created on 3-31-20 which was attached to the appeal brief C-210640. Struckman responded with request to reconsider clarifying the evidence titled exhibit J judgment "Struckman I" created on 3-31-20 stating that the future was not yet available at the 5-22-2018 trial and it was unknown at that

time what the basis for the jury's verdict was because the charging information was subjected to adversarial testing with multiple possibilities of theories of guilt. Therefore, Struckman was unable to know the factual basis for the jury's verdict at the 5-22-2018 trial. Moreover, within 120 days after trial Struckman could only speculate as to the factual basis for the jury's verdict at the 5-22-2018 trial. Therefore, the First Appellate District has unreasonably blocked all avenues for the claim with an erroneous determination, refusing to accept jurisdiction for a full and fair review has resulted in a miscarriage of justice. The Petitioner has filed a 60(B) for relief from post-conviction C-210640 for just reason cause the State of Ohio has known reasonable doubt existed to show Struckman's innocence since July 12, 2017 case C/15/CRB/10112 acquittal. Prosecutor's appellee brief can be seen as most egregious conduct because the brief was directed to the court itself while the prosecutor is aware "con 'usant" of the direct nexus between the cases and the underlying facts. The prosecutor's errant facts are clear error (citing *McCarthy v. Pollard*, 656 F.3d 478) in the appellee brief in stating "Struckman's residence", furthermore stating "the fact that other persons may have had access to the residence at various times in the past would not be sufficient to absolve Struckman of the offenses in this case where the state presented ample evidence of Struckman's exclusive dominion over the property". The aforementioned is a form of fraud on the court and any office of prosecution who continues to allow false evidence to go uncorrected (citing *Giglio v United States* 405 U.S. 150.) and continues to weaponized the default procedures as a means to cover up or avoid the wrongful conviction of Buddy Struckman defiles the essence of freedom, the U.S. Constitution, the American people, and is in opposition to everything and everyone who gives everything to defend freedom.

(b) If you did not exhaust your state remedies on Ground Four, explain why: NA

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

The issue was unsuccessful due to defendant not being timely serviced by the Trial Court or the Ohio First District Court in the prior Crim.33 filings and absolutely no reasonable excuse or O.D.R.C mail complaints was accepted for leave for the issues to be to be heard by the Ohio State Courts, this caused manifest injustice and prejudice.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (d)(1) is "Yes," state: Type of motion or Petition:

Petition to Vacate or set Aside Judgment of Conviction

Name and location of the court where the motion or petition was filed:

Hamilton County Court of Common Pleas, Cincinnati, Ohio; Leslie Ghiz

Docket or case number: B-1502231

Date of the court's decision: 12-10-19

Result: Entry Denying Petition to Vacate or set Aside Judgment of Conviction

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Ohio First District Court of Appeals

Docket or case number: C-200069

Date of the court's decision: 3-31-21

Result: Affirmed (See Attachment B, A-4, A-5)

Court states that the issues should be raised in direct appeal and it is defendants own fault, furthermore states issue and argument "not cogent in the sense is could not fairly be said to advance beyond mere hypothesis".

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: NA

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Four:

(1) Reconsideration app.r.26(a)

(2) Supreme Court of Ohio

(3) Successive Petition to Vacate or Set Aside Judgment of Conviction or Sentence

(f) If you did not exhaust your state remedies on Ground Four, explain why: NA

(g) If you did not exhaust your state remedies on Ground Four, explain why: NA

(h) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? NO

(2) If you did not raise this issue in your direct appeal, explain why:

Advisory council refused to advise on the issues, and Pro-*se* was ordered

by the trial court that issues were not relevant "moot", "you don't get that right" , "this is not double jeopardy" which forced the evidence out of the record. Ultimately Direct appeal counsel ignored demand letters which appellant filed with the clerk thereby refused to raise the issues or incorporate the issues into the brief. All reasonable vehicles have been blocked by the State of Ohio to bring exculpatory evidence showing innocence. Ultimately appellant counsel unreasonably neglected the issues about errant facts, "res- judicata" double jeopardy, prosecutorial misconduct, illegal search seizure, US. Constitution Amendment V, XIV

(I) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? YES

(2) If your answer to Question (I)(1) is "Yes," state: Type of motion or Petition:

Petition to Vacate or set Aside Judgment of Conviction

Name and location of the court where the motion or petition was filed:

Hamilton County Court of Common Pleas, Cincinnati, Ohio; Leslie Ghiz

Docket or case number: B1502231

Date of the court's decision: 10-21-21

Result: Entry Dismissing / Granting prosecutors motion

(3) Did you receive a hearing on your motion or petition? YES

(4) Did you appeal from the denial of your motion or petition? YES

(5) If your answer to Question (I)(4) is "Yes," did you raise this issue in the appeal? YES

(6) If your answer to Question (I)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Ohio First District Court of Appeals

Docket or case number: C-210640

Date of the court's decision: 8-17-22

Result: Affirmed (See Attachment D)

Court states "all the evidence" which includes exhibit J judgment "*Struckman I*" created 3-31-20 was known or made known at trial also stating he cannot show unavoidable prevention.

(7) If your answer to Question (I)(4) or (I)(5) is "No," explain why you did not raise this issue: NA

(J) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies etc.) that you have used to exhaust your state remedies on Ground Four:

(1) Summary Judgment / Objections to prosecutor's untimely filings

(2) Relief from Judgment Civ.R.60(B), Justifying relief from Judgment

(3) Reconsideration app.r.26(a)

(4) Supreme Court of Ohio

(k) If you did not exhaust your state remedies on Ground Four, explain why: NA

17. Please answer these additional questions about the petition you are filing:

(a) Have all the grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? YES

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: No. All Grounds in this petition have been presented in state court.

18. Have you previously filed any type of petition, application, or motion in a federal court Regarding the conviction that you challenge in this petition? NO

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. NA

19. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? NO

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. NA

20. Give the name and addresses, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Bradly Hoyt

(b) At arraignment and plea: Unknown

(c) At Trial: Craig Newburg, 230 E. 9th St. 2nd fl. Cincinnati, Ohio 45202

(d) At sentencing: Craig Newburg, 230 E. 9th St. 2nd fl. Cincinnati, Ohio 45202

(e) On appeal: David Hoffmann, 230 E. 9th St. 2nd fl. Cincinnati, Ohio 45202

(f) In any post-conviction proceeding: Pro-se

(g) On appeal in any post-conviction proceeding: Pro-se

21. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? NO

22. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition. *

Petitioner is in compliance with current stay conditions see **Case No. 1:20-cv-737 at Doc#19PAGEID#132.**

*The Antiterrorism an Effective Death Penalty Act of 1996 ("AEDPA") as written in 28 U.S.C.§ 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a Persons in custody pursuant to the judgment of a State court. The limitation period shall run from The latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution of laws of the United States is removed, if the applicant

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to case on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending shall not be counted toward any period of limitation under this subsection.

Wherefore, Petitioner asks that the Court grant the following relief: to Issue a Writ of Habeas Corpus vacating the convictions and directing the State of Ohio to retry the Petitioner within 120 days or release him; and/or to any and all other just relief to which Petitioner may be entitled.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the mailing system on the 22 day of Feb., 2024:

February 22, 2024
Executed (signed) on (date)

Buddy Struckman
Signature of Petitioner, Buddy Struckman

Attachment A: 26(B) opinion

Attachment A-1: S.Ct.26(B) leave denial

Attachment A-2: O.D.R.C. Quarantine

Attachment A-3: S.Ct. Covid order

Attachment A-4: T.P. suppression hearing

Attachment A-5: Exhibit PG Acquittal Entry

Attachment B: C-200210, C-200069

Attachment C: C-220658

Attachment D: C-210640

Attachment J: C-180287

NOTARIZED CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 22 day of Feb., 2024, I served a true and Correct original and two copies of the foregoing: *Petition for Writ of Habeas Corpus* with Attachments A, A-1, A-2, A-3, A-4, A-5, B, C, D, J upon:

U.S. District Court, Southern District of Ohio
Attn: Office of the Clerk
100 East Fifth Street, Room 103
Cincinnati, Ohio 45202

by submitting same to a designated civilian employee of the Ohio Department of Rehabilitation & Corrections for prompt processing and (check one) X certified __ uncertified mailing by authorized prison personnel within the facility mailroom, with sufficient first class postage affixed, and it shall be deemed FILED as of the above date, per the federal "mailbox rule", *Houston v. Lack*, 487 U.S. 266 (1998).

Buddy Struckman 2.22.24
(signature)

Buddy Struckman, Petitioner, *Pro se*
O.D.R.C. #744572
Richland Correctional Institution
1001 Olivesburg Road
Mansfield, Ohio 44905

STATE OF OHIO)
) **SS.NOTARIZATION**
COUNTY OF RICHLAND)

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for the above State and County, of this 22nd, day of, February 2024.

CIANI BISHOP
Notary Public
State of Ohio
My Comm. Expires
September 19, 2026

Ciani B
Notary – Signature:

Ciani Bishop
Notary – Printed Name:

09/19/2026
My Commission Expires:

Richland
County of Residence:

Attachment A: 26(B) opinion

Entry Denying 26(B) Application for Reopening

Feb 03, 2021

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-180287
Plaintiff-Appellee,	:	
vs.	:	*ENTRY DENYING 26(B) APPLICATION FOR REOPENING.*
BUDDY STRUCKMAN,	:	
Defendant-Appellant.	:	

ENTERED
FEB 03 2021

D130974311

We consider this cause upon defendant-appellant Buddy Struckman's App.R. 26(B) application to reopen this appeal. We deny the application.

Struckman was convicted upon jury verdicts finding him guilty on two counts of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A), namely an automatic weapon and a suppressor, along with two specifications under R.C. 2941.144 that he had possessed an automatic firearm equipped with a suppressor. In his direct appeal, we affirmed his convictions, overruling assignments of error challenging the weight and sufficiency of the evidence, his waiver of counsel, and his competency to stand trial. *State v. Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, *appeal not accepted*, 159 Ohio St.3d 1446, 2020-Ohio-3712, 149 N.E.3d 523.

Struckman timely applies under App.R. 26(B) to reopen his direct appeal. An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998);

App.R. 26(B)(5). The standard for determining whether an applicant was denied the effective assistance of appellate counsel is that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See State v. Simpson*, Slip Opinion No. 2020-Ohio-6719, ¶ 22 ("reaffirm[ing]" the court's holding in *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996), "that the two-prong standard articulated in *Strickland* * * * applies to App.R. 26(B) applications"). The applicant must prove "that his counsel [performed deficiently in] failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

Struckman asserts that his appellate counsel was ineffective in including in his brief, and refusing to correct, an "errant statement of facts," in failing to renew his motion to remove his appeal from the accelerated calendar, and in failing to present the following assignments of error:

(1) * * * the court erred in denying motion to suppress.

(2) Trial court erred in denying motion in limine [and] denying objections, [and] failed to protect defendant and limit the admissibility of prejudicial evidence, questions and statements.

(3) The evidence at trial does not fully support the jury's finding of knowingly to prove guilt.

For the following reasons, we conclude that Struckman has failed to establish "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."

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FEB 03 2021

Weight and Sufficiency of the Evidence

In his third proposed assignment of error, Struckman contends that the jury's verdicts were not "fully support[ed]" by evidence that he had "knowingly possessed" the dangerous ordnances. This court concluded to the contrary in overruling the assignment of error presented on appeal challenging the weight and sufficiency of the evidence to support Struckman's convictions. *See Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, at ¶ 10-20. Therefore, the proposed assignment of error does not satisfy App.R. 26(B)(2)(c)'s requirement that an application for reopening set forth proposed assignments of error or supporting arguments that had not been "previously * * * considered on the merits in the case by any appellate court."

Motion to Suppress

In his first proposed assignment of error, Struckman challenges the overruling of his motion to suppress the .45-caliber MAC-10 fully-automatic handgun and home-made suppressor seized pursuant to a search warrant from the house where he was living. He argues that the trial court should have granted suppression on the ground that the warrant did not satisfy the "particularity" requirement of the Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution.

The Fourth Amendment provides that no warrants shall issue except those "* * * particularly describing * * * the things to be seized." Article I, Section 14, of the Ohio Constitution "is nearly identical in its language, and its protections are coextensive with its federal counterpart." *State v. Kinney*, 83 Ohio St.3d 85, 87, 698 N.E.2d 49 (1998).

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The "particularity" required in a warrant "varies with the nature of the items to be seized. Where * * * the items are evidence or instrumentalities of a crime, * * * the key inquiry is whether the warrants could reasonably have described the items more precisely than they did." *State v. Benner*, 40 Ohio St.3d 301, 307, 533 N.E.2d 701 (1988). Thus, a warrant satisfies the "particularity" requirement if it "describe[s] the items to be seized with as much specificity as the government's knowledge and the circumstances allow." *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 80.

The affidavit supporting the warrant stated that two people in the vicinity of 622 Maple Street saw a man on the second floor of the house fire a single round from a "black firearm" and then retreat into the house. Both victims subsequently identified the man as Struckman. The warrant authorized a search of 622 Maple Street for "[t]he firearm that was used to fire at the two persons," along with "any other property that is deemed contraband."

Pursuant to that warrant, police seized from a small living area on the second floor of the house multiple loaded magazines and a holster for a .45-caliber semi-automatic handgun found under the cushions of a sofa. The fire department was called to force open a safe found in a closet off the living area. Police seized, from the closet, multiple boxes containing 600 rounds of .45-caliber ammunition and, from the safe, the MAC-10, its detached stock, the suppressor, two high-capacity magazines fully loaded with .45-caliber ammunition, and a bandolier with three fully loaded magazines.

Nothing in the record suggests that the affidavit supporting the warrant did not accurately reflect the circumstances or the full extent of what the government knew in seeking the warrant, or that the warrant could reasonably have described with more precision the items to be seized. Because the warrant described the items to be seized with as much specificity as the government's knowledge and the

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circumstances allowed, the "particularity" requirement was satisfied. Thus, the proposed assignment of error, challenging the trial court's denial of suppression on that ground, would not have presented a reasonable probability of success had counsel advanced it on appeal.

Other-Acts Evidence

Struckman's second proposed assignment of error challenges the overruling of his motion in limine and objections at trial to the admission of "prejudicial" evidence, questions and statements" concerning "firearms and accessories" seized in the search that were the subject of misdemeanor charges that had been dismissed.

A motion in limine is essentially a request for a precautionary ruling on an anticipated evidentiary issue. The trial court need not even rule upon the motion. And regardless of the court's disposition of the motion, error in the ultimate admission of the challenged evidence must be preserved by objection when the issue is broached at trial. In the absence of a timely objection, any error in the admission of the evidence is waived unless it rises to the level of plain error. *See State v. Brown*, 38 Ohio St.3d 305, 311-312, 528 N.E.2d 523 (1988).

At trial, Struckman objected to the admission of evidence concerning the semi-automatic handgun, accessories, and ammunition seized from living area of the house. He argued that that evidence was not relevant to the charges that he had unlawfully possessed the MAC-10 handgun and silencer, and that admitting that evidence would be unduly prejudicial and would confuse and "incite" the jury. The assistant prosecuting attorney countered that that evidence, found scattered among other belongings throughout the small living area of the house, was admissible to show that Struckman had constructively possessed the MAC-10 and silencer found in the safe in the closet off the living area. The trial court overruled objections to the semi-automatic handgun and its magazine, holster, and ammunition when they where offered at trial. Struckman did not request a limiting instruction. But he

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FEB 03 2021

elicited on cross-examination of the police officer who had executed the warrant the statement that he was being tried for possessing only the MAC-10 and suppressor.

> For other-acts evidence to be admissible,
>
> (1) the evidence must be relevant, Evid.R. 401, (2) the evidence cannot be presented to prove a person's character to show conduct in conformity therewith but must instead be presented for a legitimate other purpose, Evid.R. 404(B), and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice, Evid.R. 403.

State v. Graham, Slip Opinion No. 2020-Ohio-6700, ¶ 72, citing *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

Under Evid.R. 404(B), evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person to show that the person acted in conformity with that character in committing the charged act. But other-acts evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The decision whether to admit other-acts evidence for a purpose permitted under the rule is committed to the sound discretion of the trial court. *Graham* at ¶ 72, citing *State v. Hartman*, Slip Opinion No. 2020-Ohio-4440, ¶ 22.

The trial court could not be said to have abused its discretion in admitting, over objection, evidence pertaining to Struckman's possession of firearms and accessories other than the MAC-10 and suppressor. The record permitted the conclusion that that evidence was probative of Struckman's identity as the possessor of the premises in which the dangerous ordnances had been found, and that the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. Moreover, any error in admitting that evidence may fairly be said to have been harmless beyond a reasonable doubt,

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FEB 03 2021

because in light of the overwhelming evidence of Struckman's guilt of the charged offenses, the evidence could not possibly be said to have unduly influenced the jury's verdicts. *See* Crim.R. 52(A); *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph seven of the syllabus, *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155 (1978). Thus, the second proposed assignment of error, challenging the admission of that evidence, would not have presented a reasonable probability of success had counsel advanced it on appeal.

Statement of Facts and Removal from Accelerated Calendar

Finally, appellate counsel cannot be said to have been constitutionally ineffective in including in Struckman's brief the allegedly "errant statement of facts" or in failing to renew the motion to remove this appeal from the accelerated calendar. Appellate counsel's statement of the facts, however "errant," cannot be said to have prejudiced Struckman, when this court's decision in any appeal is based upon a thorough review of the record leading to the judgment appealed. *See* App.R. 12(A)(1)(b). And nothing in Struckman's application, supporting evidentiary material, or the record on appeal demonstrates that this appeal would have succeeded on the merits had it not been placed on the accelerated calendar.

Struckman has failed to demonstrate a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel. Accordingly, the court denies his application to reopen this appeal.

To the clerk:

Enter upon the journal of the court on FEB 03 2021,

per order of the court _____.

Presiding Judge

(COPIES SENT TO ALL PARTIES.)

ENTERED
FEB 03 2021

Attachment A-1: S.Ct. 26(B) leave denial

Office of The Clerk

The Supreme Court of Ohio

OFFICE OF THE CLERK
65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
MAUREEN O'CONNOR

JUSTICES
SHARON L. KENNEDY
PATRICK F. FISCHER
R. PATRICK DEWINE
MICHAEL P. DONNELLY
MELODY J. STEWART
JENNIFER BRUNNER

CLERK OF THE COURT
SANDRA H. GROSKO

TELEPHONE 614.387.9530
FACSIMILE 614.387.9539
supremecourt.ohio.gov

April 06, 2021

Buddy Struckman 744-572
Pickaway Correctional Institution
P.O. Box 209
Orient, OH 43146

Dear Mr. Struckman:

The enclosed documents were not filed because they do not comply with the Rules of Practice of the Supreme Court of Ohio. Neither untimely documents nor requests for extensions of time to file jurisdictional documents are permitted. The deadline for filing an appeal of a court of appeal's decision dated February 3, 2021 was March 22, 2021 but the jurisdictional documents were not received until April 6, 2021. See Rule 3.02(B), Rule 3.03(B)(2), and Rule 7.01(A)(1)(a).

Please also note that Rule 7.01(A)(4)(c) prohibits the filing of motions for delayed appeal for appeals brought pursuant to App.R. 26(B).

A copy of the Rules of Practice and Guide to Filing are enclosed.

Sincerely,
Clerk's Office

Enclosures

Attachment A-2: O.D.R.C. Quarantine

To: All Staff and Inmate Population

Ohio | Department of Rehabilitation & Correction

Mike DeWine, Governor
Annette Chambers-Smith, Director

To: **All Staff and Inmate Population**
From: **S. Ratcliff, Major**
Through: **Warden Collins**
Date: **September 23, 2020**
Re: **C Unit, D2 1 Bay and FHC Quarantine**

Effective Monday September 27, 2020, C Unit, D2 1 Bay and FHC will no longer be quarantined from the remaining population.

Units will still be scheduled for Food Service, B Building, Programs Building, Education and Inside Recreation (Gym) by cohorts (A Unit, B Unit, C Unit D Unit)

Outside recreation periods will be open to all units.

Compliance with mask wearing and social distancing during open recreation periods will be monitored. Non-compliance may lead to a return to a staggered/rotating outside recreation schedule.
Please do your part, **WEAR YOUR MASK** and maintain appropriate **SOCIAL DISTANCE**.

ROLL CALL READ x5 DAYS
Warden
DWO
DWSS
Major
UMC
Shift Supervisors
PIM - File

United States Census 2020 | BE COUNTED Ohio
It's easy, safe and important.
Census.Ohio.Gov

Attachment A-3: S.Ct. Covid Order

The Supreme Court of Ohio

JOURNALIZED
APR 14 2020
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

FILED
APR 14 2020
CLERK OF COURT
SUPREME COURT OF OHIO

In re: Application of the Rules of Practice of the Supreme Court of Ohio

ENTRY

WHEREAS, on March 9, 2020, the Governor of Ohio issued Executive Order 2020-01D and declared a state of emergency in Ohio in response to COVID-19;

WHEREAS, on March 11, 2020, the World Health Organization publicly characterized COVID-19 as a global "pandemic" requiring "urgent and aggressive action" to control the spread of COVID-19;

WHEREAS, on March 13, 2020, the President of the United States declared a National Emergency;

WHEREAS, on March 27, 2020, the Governor of Ohio signed into law Am. Sub. H.B. 197, which immediately tolled all statutes of limitations and other criminal, civil, and administrative time limitations under the Ohio Revised Code set to expire between March 9, 2020, and the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner;

WHEREAS, on March 27, 2020, the Court issued the order entitled "Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court and Use of Technology," which immediately tolled all time requirements imposed by rules promulgated by the Court set to expire between March 9, 2020, and the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner;

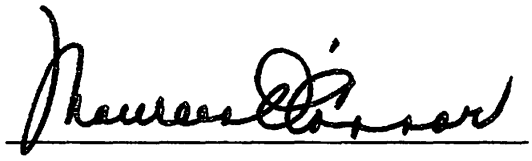
WHEREAS, the Court's hearing and consideration of cases ordinarily require limited personal interaction between the Justices and employees of the Court, attorneys, parties, and the public;

WHEREAS, through the use of technology such as video conferencing, those portions of the hearing and consideration of cases that ordinarily necessitate personal interaction can be performed in a manner that complies with social distancing requirements;

WHEREAS, the Court utilizes the E-Filing Portal, which allows for the electronic filing of case documents, and in 2019 the E-Filing Portal accounted for 67% of all filings, including 92% of all attorney filings;

WHEREAS, parties who are unable to use the E-Filing Portal may still maintain social distancing by filing paper documents by submission through delivery service or the mail, or in-person at the Clerk's office;

(3) For any other document that is filed after April 21, 2020, the party shall comply with the applicable time requirements. In addition to the provisions of S.Ct.Prac.R. 3.03(B), the Court will also grant reasonable requests to extend the time for filing of any type of document, provided that the request is necessitated by the COVID-19 emergency. A party may also file a motion for leave to file out of time, and the Clerk shall accept the motion if the delay in filing is due to the effects of or measures necessitated by the COVID-19 emergency and the motion explicitly states it is being filed because of the COVID-19 emergency.



Maureen O'Connor
Chief Justice

Attachment A-4: T.P., suppression hearing

Officer Sublet Testimony

Q. Read the top. Is that your name up there on the top on that narrative?
A. Are you asking is that my name? Yes. Entered by me, yes.
Q. Now down in the second paragraph -- actually part of the third paragraph down, it says: Police determined that police were not going to attempt to approach the quote, unquote, defendant's residence and requested that the Hamilton County Police Association Specialistist - Tactics, SWAT Team, respond.
Would you like to read that?
A. Sure.
(Document handed to the witness.)
Q. Could you read it out loud, your narrative that you had wrote?
A. Do you want me to read entire page, sir?
Q. Just the part that states -- that I just read myself, that states that no police approached the residence.
A. Where was that at, sir?
Q. Right here. That first --
A. Do you want me to read that

paragraph?
Q. Yes.
A. Police determined that police were not going to attempt to approach the defendant's residence and requested that the Hamilton County Police Specialist SWAT team respond.
Q. Thank you. Now, you were the respondent or the police that responded, correct?
A. I was the what?
Q. Were you the police that responded to the scene?
A. Yes. I was one of the officers that responded to the scene.
MR. STRUCKMAN: I rest that quote, Your Honor. Deal with credibility.
THE COURT: Well, it goes to credibility but, okay. I understand why you were asking the question. Anything else that you would like to ask, Mr. Struckman?
Q. If I could come back to what exactly transpired now that we got somewhat of an idea of the credibility of the officer, what exactly transpired could be questionable.

So as to Josh Rusk's version of how the return on the search warrant came to be signed, there is no reason for me to doubt Josh Rusk's credibility whatsoever.
But I do, in fact, have a reason to doubt Officer Sublet's credibility due to his own statement being contradictory to his report.
THE COURT: Okay. I will make it clear to you. I understand your reasoning to doubt it. But it's really what I believe based on how you question him and based on what he said, how credible that testimony to be.
So I understand that you doubt his credibility and his testimony. It's just a matter of what I think based on what I am hearing here today.
MR. STRUCKMAN: And I would like to note or I would like to further question the witness.
THE COURT: Over?
MR. STRUCKMAN: Over the report.
THE COURT: What report? Is this -- what report is it that --

MR. STRUCKMAN: This was a report of the incident that was an accusation that had alleged to have happened at 622 Maple Street where I was alleged or accused of being a resident, and what alleged to have transpired there.
THE COURT: Officer Sublet, is that what led to the search warrant?
THE WITNESS: That he was a resident?
THE COURT: What he is talking about. What he just said, whatever he is talking about the incident that happened, is that what gave rise to you -- your department getting a search warrant?
THE WITNESS: Yes.
THE COURT: Yes. You can ask him a few questions about that.
Q. Did the MAC 10 have any reasoning for the origin of this search warrant?
A. No.
Q. Are you aware that the case that involved -- or the case that stemmed from the search warrant was found not guilty or dismissed on want of prosecution?

Attachment A-5: Exhibit PG Acquittal Entry

Defendant's Exhibit PG Journal Entry

Case No. C/15/CRB/10112

#7

Defendant's Exhibit MB:
Quitclaim Deed
Marked for identification before trial
Admitted: Page: 999, Line: 13

Defendant's Exhibit OVI:
Official Crime Laboratory Report
dated May 11, 2015
Marked for identification before trial
Admitted: Page: 1164, Line: 17

Defendant's Exhibit PG:
Hamilton County Municipal Court
Journal Entry for Case No. C/15/CRB/10112A
Marked for identification before trial
Admitted: Page: 964, Line: 16

Defendant's Exhibit PBG:
Hamilton County Municipal Court
Journal Entry for Case No. C/15/CRB/9541A
Marked for identification before trial
Admitted: Page: 964, Line: 14

Defendant's Exhibit PGB:
Hamilton County Municipal Court
Journal Entry for Case No. C/15/CRB/9541C
Marked for identification before trial
Admitted: Page: 964, Line: 17

Defendant's Exhibit PPG:
Hamilton County Municipal Court
Journal Entry for Case No. C/15/CRB/9541B
Marked for identification before trial
Admitted: Page: 964, Line: 17

Defendant's Exhibit ST:
Photograph
Marked for identification before trial
Admitted: Page: 1198, Line: 10

Defendant's Exhibit TT:
Manual for Notaries
Marked for identification before trial
Admitted: Page: 1373, Line: 12

Defendant's Exhibit X:
Hamilton County Auditor Property Information
Marked for identification before trial
Admitted: Page: 1184, Line: 6

Attachment B: C-200210, C-200069

First Appellate District OPINION

March 31, 2021

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-200069 C-200210
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-1502231
vs.	:	
BUDDY EUGENE STRUCKMAN,	:	*OPINION.*
Defendant-Petitioner-Appellant.	:	

ENTERED
MAR 31 2021

PRESENTED TO THE CLERK
OF COURTS FOR FILING
MAR 31 2021
COURT OF APPEALS

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed in C-200069;
Appeal Dismissed in C-200210

Date of Judgment Entry on Appeal: March 31, 2021

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald Springman*, Assistant Prosecuting Attorney, for Plaintiff-Respondent-Appellee,

Buddy Eugene Struckman, pro se.

ZAYAS, Presiding Judge.

{¶1} Defendant-petitioner-appellant Buddy Eugene Struckman appeals the Hamilton County Common Pleas Court's judgments overruling his Crim.R. 33 motion for a new trial and denying his petition under R.C. 2953.21 for postconviction relief. We dismiss for lack of jurisdiction Struckman's appeal from the overruling of his new-trial motion. And we affirm the common pleas court's judgment denying postconviction relief.

{¶2} In May 2018, Struckman was convicted upon jury verdicts finding him guilty of two counts of unlawful possession of a dangerous ordnance. We affirmed those convictions in the direct appeal. *State v. Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, *appeal not accepted*, 159 Ohio St.3d 1446, 2020-Ohio-3712, 149 N.E.3d 523.

{¶3} Struckman also sought relief from his convictions by filing with the common pleas court, in August 2018, motions for a new trial and for leave to move for a new trial out of time and, in November 2019, a petition under R.C. 2953.21 et seq. for postconviction relief. Here, in the case numbered C-200210, he appeals the judgment overruling his motion for a new trial. And in the case numbered C-200069, he appeals the judgment denying his postconviction petition.

App. No. C-200210—No Appeals Court Jurisdiction

{¶4} We address at the outset the state's argument that Struckman's appeal in C-200210, from the common pleas court's judgment overruling his motion for a new trial, must be dismissed for lack of jurisdiction. We agree.

{¶5} A timely filed notice of appeal confers upon a reviewing court the jurisdiction to entertain an appeal. *See* App.R. 3(A) and 4; *State ex rel. Curran v. Brookes*, 142 Ohio St. 107, 50 N.E.2d 995 (1943), paragraph seven of the syllabus.

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Generally, the notice of appeal must be filed within 30 days of entry of the final judgment sought to be appealed. App.R. 4(A)(1). If the notice of appeal is not timely filed, the appellant in a criminal case may move under App.R. 5 for leave to file a delayed appeal. In a civil case, "if the clerk has not completed service of the order [appealed] within the three-day period prescribed in Civ.R. 58(B)," the 30-day appeal period is tolled and does not "begin to run [until] the date when the clerk actually completes service." App.R. 4(A)(3).

{¶6} The notices of appeal in C-200210 and C-200069 were not filed within the 30 days prescribed by App.R. 4(A)(1). Struckman did not, in either appeal, seek leave under App.R. 5 to file a delayed appeal. And neither the judgment denying postconviction relief nor the judgment overruling the new-trial motion has been served on Struckman.

{¶7} ***Appeal from denial of postconviction petition was timely filed.*** The proceedings upon a petition under R.C. 2953.21 et seq. for postconviction relief are civil in nature and governed by the Ohio Rules of Appellate Procedure as they apply to a civil action. *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984), paragraph two of the syllabus. Thus, regardless of whether the petitioner actually knows of the judgment denying postconviction relief, the time for appealing that judgment is tolled under App.R. 4(A)(3) and begins to run only "upon service of notice of the judgment and notation of service on the docket by the clerk of courts." *State v. Young*, 1st Dist. Hamilton No. C-140236, 2015-Ohio-774, ¶ 4, quoting *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, syllabus. Because Struckman was not served with the judgment denying his postconviction petition, App.R. 4(A)(3) tolled the time for appealing that judgment. Thus, his appeal from that judgment in C-

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200069 was filed within the time prescribed by App.R. 4(A)(1), and this court has jurisdiction to review that judgment.

{¶8} ***Appeal from overruling of Crim.R. 33 motion was not timely filed.*** But proceedings under Crim.R. 33 are not civil in nature. Therefore, App.R. 4(A)(3) did not, as Struckman argues, toll the time for appealing the overruling of his Crim.R. 33 motion for a new trial.

{¶9} Nor was the time for appealing the overruling of the new-trial motion tolled under any exception to App.R. 4(A)(1)'s 30-day period provided under App.R. 4(B). App.R. 4(B)(3) speaks directly to the time for appealing a decision on a "timely" filed "post-judgment" motion for a new trial in a criminal case. Under App.R. 4(B)(3), when a criminal defendant moves under Crim.R. 33(A) for a new trial, whether on grounds of newly discovered evidence or other grounds, and that motion is filed within the time provided under Crim.R. 33(B) for filing a motion for a new trial on grounds other than newly discovered evidence, the time for appealing the judgment of conviction is tolled until the new-trial motion is decided, and the decision on the new-trial motion is then reviewable in the direct appeal. Unless that exception applies, an appeal from a judgment overruling a Crim.R. 33 motion must be filed within App.R. 4(A)(1)'s 30-day period.

{¶10} Struckman sought a new trial under Crim.R. 33(A)(1) through (4) and 33(A)(6). A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence must be filed within 120 days of the return of the verdict. A motion for a new trial on other grounds must be filed within 14 days of the return of the verdict. Crim.R. 33(B).

ENTERED
MAR 31 2021

{¶11} Struckman's verdicts were returned on May 3, 2018. He filed his Crim.R. 33 motion more than three months later, on August 22, 2018. The trial court overruled the motion on September 17, 2018. That judgment was appealed on May 22, 2020. To the extent that the motion sought a new trial on the ground of newly discovered evidence, it was timely filed for purposes of Crim.R. 33, but not for purposes of App.R. 4(B)(3)'s tolling provision. To the extent the motion sought a new trial on other grounds, it was not timely filed for either purpose.

{¶12} Thus, App.R. 4(B)(3) did not operate to toll the time for appealing the judgment overruling Struckman's Crim.R. 33 motion. His notice of appeal from that judgment in C-200210 was not filed within App.R. 4(A)(1)'s 30-day period. And he was not granted, because he did not seek, leave under App.R. 5 to file a delayed appeal. Therefore, this court has no jurisdiction to review that judgment, and the appeal in C-200210 must be dismissed.

App. No. C-200069—Postconviction Petition Properly Denied

{¶13} In the case numbered C-200069, Struckman presents four assignments of error that may fairly be read together to challenge the denial of his postconviction petition without an evidentiary hearing. Finding no merit to any aspect of this challenge, we overrule the assignments of error.

{¶14} ***The trial.*** Struckman was convicted of unlawfully possessing dangerous ordnances upon evidence that he had constructively possessed a MAC-10 automatic weapon and suppressor that had been seized in a search pursuant to a warrant of the house in which he was living. *See Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, at ¶ 14. Police Officer Drew Jones of the Lockland Police Department testified that he and his partner, Sergeant Patrick Sublet, were

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dispatched to the area of 622 Maple Street upon a 911 call reporting "a shot fired." Their investigation led them to the house at 622 Maple Street, because Officer Jones had had multiple prior contacts with Struckman there. No one responded when the officers knocked on the door. Their observation of security cameras attached to the house caused them concern for their safety and prompted them to obtain a warrant to search the house and to summon a SWAT team to secure the premises before the warrant was executed.

{¶15} When the SWAT team approached the front door, they saw Struckman on the first floor of the house near the front door. The team used "flash bangs" to encourage Struckman to come out of the house, and he was turned over to Lockland police. The team then went through the house to secure the premises for Lockland officers to conduct their search.

{¶16} Upon entering the house, police observed that the only habitable part of the house was a small living area on the second floor, consisting of an eight-by-ten-foot room, with a small closet and a walkout balcony to the front of the house. The room was furnished with a sofa, coffee table, rug, television monitor, and microwave. And it contained a trash bag full of men's clothing, a suitcase, men's shoes, and empty drink cups and fast-food bags.

{¶17} Pursuant to the warrant, police seized from the living area multiple loaded magazines and a holster for a .45-caliber semi-automatic handgun found under the sofa cushions. Nine rounds of ammunition were found in the gun's ten-round magazine.

{¶18} The door to the closet was open, possibly by force by the SWAT team in securing the premises. The closet contained a suit jacket and men's dress clothes.

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And police seized from the closet multiple boxes containing 600 rounds of .45-caliber ammunition.

{¶19} The fire department was summoned to force open a safe found in the closet. From the safe, police seized the MAC-10 and suppressor that Struckman was charged with unlawfully possessing, along with a detached stock for the MAC-10, two high-capacity magazines fully loaded with .45-caliber ammunition, and a bandolier with three fully loaded magazines. A firearm examiner from the Hamilton County Coroner's Office determined that the MAC-10 was a functioning fully-automatic weapon, and that the homemade suppressor had been made for the MAC-10.

{¶20} For the MAC-10 and suppressor, Struckman was charged with two counts of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A), along with two specifications under R.C. 2941.144 that he had possessed an automatic firearm equipped with a suppressor. Struckman was arrested at 622 Maple Street. He represented himself at trial. The jury found him guilty as charged. And the trial court sentenced him to prison terms totaling seven years.

{¶21} ***The appeal.*** In the direct appeal, we affirmed those convictions. In doing so, we overruled assignments of error challenging the weight and sufficiency of the evidence to prove that Struckman had constructively possessed the MAC-10 and suppressor, the trial court's failure to secure a waiver of counsel after rejecting Struckman's midtrial request for appointed counsel, and the trial court's finding that Struckman was competent to stand trial.

{¶22} ***The postconviction petition.*** In the postconviction petition from which this appeal derives, Struckman sought relief from his convictions on grounds of judicial bias and misconduct and alleged deprivations of the rights to

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counsel and the effective assistance of counsel. The common pleas court denied the petition upon concluding that the postconviction claims were barred under the doctrine of res judicata, when they were or could have been raised on direct appeal.

{¶23} To prevail on a postconviction claim, the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction that rendered the conviction void or voidable under the Ohio or United States Constitution. *See* R.C. 2953.21(A)(1). In advancing that claim, the petitioner bears the initial burden of demonstrating, through the petition and any supporting affidavits and the files and records of the case, "substantive grounds for relief." R.C. 2953.21(C).

{¶24} A postconviction claim is subject to dismissal without a hearing if the petitioner fails to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief. *See id.*; *State v. Pankey*, 68 Ohio St.2d 58, 428 N.E.2d 413 (1981); *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). Conversely, "the court must proceed to a prompt hearing on the issues" if "the petition and the files and records of the case show the petitioner is * * * entitled to relief." R.C. 2953.21(E).

{¶25} The common pleas court denied Struckman's postconviction claims under the doctrine of res judicata. "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding[,] except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial [that] resulted in that judgment of conviction, or

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on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶26} A postconviction petitioner may resist dismissal of a postconviction claim under the doctrine of res judicata by supporting his claim with evidence outside the record of the proceedings resulting in the conviction. But submitting outside evidence will not, by itself, preclude denying the claim under the doctrine of res judicata. Outside evidence must be "competent, relevant and material" to the claim. The evidence must "meet some threshold standard of cogency," in the sense that it is more than "marginally significant" and "advance[s] the * * * claim beyond mere hypothesis and a desire for further discovery." *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756 (Mar. 17, 1993). The evidence must be other than cumulative of or alternative to the evidence presented at trial. *State v. Combs*, 100 Ohio App.3d 90, 98, 652 N.E.2d 205 (1995). Finally, submitting outside evidence in support of a postconviction claim will not preclude denying the claim under the doctrine of res judicata, if the claim could fairly have been determined on direct appeal from the judgment of conviction, based upon the materials contained in the trial record. *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982), syllabus; *Perry* at paragraph nine of the syllabus.

{¶27} ***Ineffective assistance of counsel—no outside evidence.*** In his third postconviction claim, Struckman asserted that he had been denied the effective assistance of counsel, because standby counsel appointed to assist him in representing himself had failed to prepare a defense, investigate or request an investigator, inquire into his competency, or investigate "exculpatory evidence" in the form of firearm-registration requirements. Struckman did not support this claim

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with evidence outside the record of the proceedings resulting in his convictions. Therefore, the common pleas court properly denied the claim under the doctrine of res judicata.

{¶28} ***Ineffective assistance of counsel—motion to suppress.*** In his fourth postconviction claim, Struckman asserted that he had been denied the effective assistance of trial counsel, when previously appointed counsel, in moving to suppress evidence seized in the search of 622 Maple Street, had "motioned the court for a *Franks* hearing, but * * * did not raise the issue of the sworn statement for probable cause [that is, the search-warrant affidavit] having false statements." In support of that claim, Struckman offered outside evidence consisting of a photocopy of a portion of a letter directed to him, dated two months before he filed his postconviction petition, from an unnamed person in the Office of the Hamilton County Public Defender. The letter provided a response to Struckman's question in earlier correspondence concerning whether an unstated "stipulation should also put into question the veracity of the [search-warrant affidavit]." The letter's author stated that "the issue of the veracity of the search warrant affidavit [was] raised in a motion to suppress," but "[t]he motion to suppress that was eventually presented in this case did not address this issue, and when the testimony at trial later showed that the affidavit was wrong, it was too late." The letter's author added that "[t]he falsehood in the affidavit does reflect poorly upon the credibility of the state's witnesses."

{¶29} Struckman also offered the municipal court's "probable cause checklist" to support his assertion that the affidavit "is not accurate to the checklist." And he pointed to evidence in the trial record. Struckman noted that the search-

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warrant affidavit, which was signed by Sergeant Sublet, stated that police responding to the 911 call "attempted to contact the male but he has barricaded himself inside the residence and is refusing to answer the door." And Struckman insisted that Officer Jones's trial testimony showed that "there w[ere] not barricades [as] fabricated in the [affidavit]," and that "it was stipulated * * * that no shots were fired and the gun shot residue test was negative showing that no firearms were fired or handled by the defendant."

{¶30} To prevail on a claim of ineffective assistance of trial counsel, a postconviction petitioner must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, the petitioner must demonstrate that counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *State v. Powell*, 90 Ohio App.3d 260, 266, 629 N.E.2d 13 (1993), citing *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), and *Strickland*.

{¶31} The affidavit supporting the warrant to search 622 Maple Street stated that two people in the vicinity of the house had seen a man on the second floor of the house fire a single round from a "black firearm" and then retreat into the house; that the victims had subsequently identified the man as Struckman; and that police responding to the 911 call had "attempted to contact the male but he has barricaded himself inside the residence and is refusing to answer the door." The warrant authorized a search of the house for "[t]he firearm that was used to fire at the two persons," along with "any other property that is deemed contraband." Pursuant to

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that warrant, police seized from the small second-floor living area multiple loaded magazines and a holster for the .45-caliber semi-automatic handgun found under the sofa cushions, 600 rounds of .45-caliber ammunition found in the closet, and the MAC-10, detached stock, suppressor, and multiple loaded high-capacity magazines found in the safe.

{¶32} Counsel filed a motion to suppress the fruits of the search on the ground that the affidavit for the warrant had included false statements material to the finding of probable cause. The motion alleged that the victims' reliability had not been established, and that the affidavit had falsely stated that Struckman had fired a round at the victims. No witnesses were presented at the hearing on the motion, because, as counsel complained, the police officers who had been subpoenaed did not appear. Counsel presented a copy of the affidavit and argued that it was overly broad and vague, and that it was insufficient to show probable cause because the victims were not named in the affidavit and were not otherwise established as reliable witnesses.

{¶33} In its entry overruling the motion, the trial court applied the probable-cause analysis provided in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The court noted that the *Gates* analysis includes an inquiry into the informant's veracity or the reliability of the informant's report, and that for purposes of the warrant affidavit, a person who reports that he or she was the victim of the described criminal conduct is ordinarily considered sufficiently credible to merit belief. The court found that "under the totality of the circumstances, the affidavit for the search warrant creates a fair probability that evidence of a crime would be found at 622 Maple St." Upon that finding, the court concluded that the warrant had been

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properly issued upon probable cause, and that the warrant was not too broad, vague, or unreasonable.

{¶34} At trial, Struckman cross-examined Officer Jones concerning the search-warrant affidavit signed by Sergeant Sublet. Asked by Struckman to look at photographs of the premises and confirm that they did not show "a barricade," Officer Jones denied ever suggesting that there had been a barricade. Also during Officer Jones's cross-examination, the state stipulated that "no gunshot residue was located or the results came back negative with regard to Mr. Struckman." Struckman overcame the state's objection to this line of questioning by asserting that it was relevant, and thus admissible, to show that he had not constructively possessed the weapons found in the residence.

{¶35} In his fourth postconviction claim, Struckman asserted, and offered the public defender's letter to show, that he had been denied the effective assistance of counsel, when previous appointed counsel did not challenge the veracity of the warrant affidavit with the "false" statements in the affidavit concerning "barricades" and "shots fired." But the trial court expressly found the affidavit credible based not on Sergeant Sublet's statement that Struckman had "barricaded himself inside the residence barricade," but on the presumed credibility of the victims who had reported the criminal conduct described in the affidavit. Moreover, the record includes the transcript of the proceedings on the motion to suppress, along with the testimony elicited at trial concerning the gunshot-residue test results and the absence of "barricades." Thus, the outside evidence offered in support of the fourth claim, consisting of the public defender's suggestion in his letter that a stronger case for suppression could have been made if counsel had used the alleged "falsehoods"

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concerning "barricades" and "shots fired" to challenge the affidavit, was not "cogent" in the sense that it could not fairly be said to advance beyond mere hypothesis the claim of an outcome-determinative deficiency in trial counsel's presentation of the motion to suppress. Therefore, the submission of that evidence did not preclude the common pleas court from applying the doctrine of res judicata to deny the claim.

{¶36} ***Judicial bias and misconduct and rights to counsel and the effective assistance of counsel.*** In his first postconviction claim, Struckman alleged judicial bias and misconduct and deprivations of the rights to counsel and the effective assistance of counsel, when he continued to represent himself with standby counsel after he had requested "full counsel" in the middle of his trial. In his second postconviction claim, he asserted that standby counsel had been ineffective in refusing, without a "proper explanation," to take over the defense when asked to do so "midway" through the trial; in failing to ask the public defender about providing counsel; and in requesting, but then leaving it to him to use, trial transcripts to impeach witnesses.

{¶37} Struckman supported those claims with outside evidence in the form of an email from the trial court to standby counsel that, Struckman asserted, showed that the judge had forced him to continue representing himself. In that email, the trial court outlined the procedure that it intended to follow at the upcoming hearing on Struckman's request, made toward the end of trial, that standby counsel take over the defense. And the court asked standby counsel to share the email with Struckman.

{¶38} The record of the proceedings at the hearing showed that the trial court followed the procedure outlined in the email. The court recited the events

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prompting the hearing. Struckman declined the opportunity to hire private counsel. He also declined the court's offer to ask the public defender, or to ask standby counsel to ask the public defender, to appoint an attorney to represent him. And he stated that he was "comfortable with continuing with [standby counsel] as standby counsel."

{¶39} In the direct appeal, this court overruled an assignment of error alleging that Struckman had been denied his right to counsel, when following the hearing on his midtrial request for counsel, he did not waive his right to counsel. In our decision, we detailed how the trial court had substantially complied with the Crim.R. 44 waiver requirement. And we concluded that Struckman had not been denied his constitutional right to counsel, because he had, in fact, chosen self-representation. *Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, at ¶ 21-38.

{¶40} In his first and second postconviction claims, Struckman alleged that the trial court, in refusing his midtrial request for appointed counsel to take over his defense, had been biased against him and had, along with standby counsel, denied his rights to counsel and the effective assistance of counsel. The outside evidence offered in support of those claims, consisting of the trial court's email to standby counsel (and through counsel, to Struckman), outlining the procedure for addressing the request that "full counsel" take over the defense, essentially confirmed what this court, in the direct appeal, determined that the record showed: that the trial court had been committed to complying with the waiver requirement and ensuring that Struckman was not denied his right to counsel. Thus, the first and second postconviction claims either were or could have been fairly determined on direct

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appeal, based on matters disclosed in the trial record. Because the email was merely cumulative of the evidence of record, its submission did not preclude the common pleas court from applying the doctrine of res judicata to deny the first and second postconviction claims.

Appeal Dismissed in C-200210 and Judgment Affirmed in C-200069

{¶41} To summarize, we hold that this court had no jurisdiction to review the common pleas court's judgment overruling Struckman's motion for a new trial, because the notice of appeal in the case numbered C-200210 was not timely filed. *See* App.R. 3(A) and 4; *State ex rel. Curran*, 142 Ohio St. 107, 50 N.E.2d 995, at paragraph seven of the syllabus. Accordingly, we dismiss that appeal.

{¶42} And we hold that the common pleas court did not err in applying the doctrine of res judicata to deny Struckman's postconviction claims, because those claims presented matters that could fairly have been determined without resort to evidence outside the trial record. *See Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph nine of the syllabus; *Cole*, 2 Ohio St.3d at 114, 443 N.E.2d 169. Accordingly, in the case numbered C-200069, we affirm the court's judgment denying Struckman's petition for postconviction relief.

Judgments accordingly.

CROUSE and WINKLER, JJ., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

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Attachment C: C-220658

First Appellate District OPINION

October 04, 2023

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-220658 TRIAL NO. B-1502231
Plaintiff-Appellee,	:	
vs.	:	*OPINION.*
BUDDY STRUCKMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 4, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Keith Sauter*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Buddy Struckman, pro se.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

OCT 0 4 2023

COURT OF APPEALS

Bock, Judge.

{¶1} Defendant-appellant Buddy Struckman appeals the Hamilton County Common Pleas Court's judgment denying his Crim.R. 33(B) motion for leave to file a new-trial motion and his motion for summary judgment. We affirm.

I.

{¶2} Following a jury trial, Struckman was convicted in May 2018 of two counts of unlawful possession of a dangerous ordnance, specifically an automatic firearm and suppressor, and sentenced to a seven-year prison term. This court affirmed his convictions on appeal, holding that there was sufficient evidence presented that Struckman had exercised dominion and control over the area (a safe in a closet) where the dangerous ordnances were found and that he would have been aware of their presence. *State v. Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, *appeal not accepted*, 159 Ohio St.3d 1446, 2020-Ohio-3712, 149 N.E.3d 523 (*"Struckman I"*). Struckman unsuccessfully challenged his convictions in postconviction proceedings in 2019 and 2021. *See State v. Struckman*, 1st Dist. Hamilton Nos. C-200069 and C-200210, 2021-Ohio-1043 (*"Struckman II"*) (affirming denial of postconviction relief where claims of ineffective assistance of counsel were barred by res judicata); *State v. Struckman*, 1st Dist. Hamilton No. C-210640, 2022-Ohio-2848 (*"Struckman III"*) (common pleas court lacked jurisdiction to consider successive postconviction petition where petitioner had not been unavoidably prevented from discovering the evidence upon which his claims were based).

{¶3} In October 2022, Struckman filed a "Motion for Leave to Proceed" seeking leave under Crim.R. 33(B) to file a motion for a new trial based on newly discovered evidence. In support, Struckman attached the following to his motion for leave: (1) this court's opinion in *Struckman I*; (2) *Lucas v. Hamilton Cty. Mun. Court*, S.D.Ohio No. 1:12-cv-138, 2012 U.S. Dist. LEXIS 76744 (Jun. 4, 2012); (3)

excerpts from the transcript of his 2018 felony trial; (4) excerpts from the transcript of his 2017 misdemeanor trial; (5) the affidavit for his arrest; and (6) the exhibit list from his 2018 felony trial.

{¶4} Struckman argues that this evidence demonstrates that he was not the only person who had access to the house at 622 Maple Street where the dangerous ordnances were found. Specifically, he points to excerpts from his 2017 misdemeanor trial for drug offenses that stemmed from items found on a table during the search of the residence at 622 Maple Street. Struckman, in his 2017 trial, was acquitted of those charges after the trial court had found that "other people may have had access to the area where the drugs were found." Struckman believes that he should have been acquitted of the felony charges for the same reason even though the drugs were found in the open living room area of the residence and the dangerous ordnances were found in a safe in what appeared to be a locked closet. Because he was found guilty of constructively possessing the dangerous ordnances in his 2018 felony trial, Struckman argues that his constitutional protections against double jeopardy were violated, and he was denied a fair trial.

{¶5} When the state did not file a timely response to his motion for leave, Struckman moved for "summary of judgment," asking the common pleas court to grant his motion for leave. The court summarily denied both motions.

II.

{¶6} Bringing forth three assignments of error, Struckman now appeals from the court's judgment. In his first and second assignments of error, Struckman contends that the common pleas court erred by denying his Crim.R. 33(B) motion for leave and his motion for summary judgment.

{¶7} We review the denial of a Crim.R. 33(B) motion for leave under an abuse-of-discretion standard. *State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, ¶ 29. Crim.R. 33(A) states: "A new trial may be granted on motion of

the defendant for any of the following causes affecting materially the defendant's substantial rights: * * * (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Generally, a motion for a new trial based on newly discovered evidence must be filed within 120 days after the jury rendered its verdict or the trial court issued its decision if the defendant waived the right to a jury trial. Crim.R. 33(B). Here, the jury verdict in Struckman's felony trial was rendered on May 3, 2018. Therefore, he is beyond the 120-day time period for filing a motion for a new trial.

{¶8} An untimely motion for a new trial based on newly discovered evidence may be filed if the defendant first establishes by clear and convincing evidence that he was unavoidably prevented from discovering the evidence within the 120-day period. *Id.* A party is "unavoidably prevented" from filing a motion for a new trial if "the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. McKnight*, 2021-Ohio-2673, 176 N.E.3d 802, ¶ 11 (4th Dist.), citing *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

{¶9} Struckman argues that the evidence he attached to his motion could not have been discovered during the 120-day time period in the exercise of reasonable diligence. We disagree. All of the "evidence" attached to Struckman's motion for leave, except for this court's decision in *Struckman I*, was available to him before or at his felony trial or within 120 days from the guilty verdict, regardless of whether Struckman had taken the time to gather that information. With respect to our opinion in *Struckman I*, this is not "new evidence." Although Struckman was unaware that this court would affirm his convictions, he was aware of all of the facts

noted in the opinion and that he had been convicted of possessing dangerous ordnances and acquitted of misdemeanor drug charges. Accordingly, he was aware of the grounds of his motion for a new trial within the 120-time period and was not unavoidably prevented from filing a timely new-trial motion. *See State v. Risden*, 2d Dist. Montgomery No. 25234, 2013-Ohio-1823, ¶ 13.

{¶10} Additionally, the common pleas court did not err in overruling Struckman's motion for summary judgment, which was essentially a request that the court rule on his Crim.R. 33(B) motion for leave. Although Struckman argues that the common pleas court should not have considered the state's untimely response to his Crim.R. 33(B) motion for leave, regardless of whether the court did, the court properly denied Struckman's motion for leave as Struckman failed to demonstrate that he was unavoidably prevented from timely filing a new-trial motion. Accordingly, the first and second assignments of error are overruled.

III.

{¶11} In his third assignment of error, Struckman contends that he should be granted a new trial because the state violated "U.S. Constitutional Amendments X, XIV, FAIR TRIAL, DUE PROCESS, DOUBLE JEOPARDY, [and] EQUAL PROTECTIONS." We do not address this assignment of error because it goes to the merits of Struckman's new-trial motion, which the common pleas court did not consider. And we are unable to reach the merits of the new-trial motion as well. *See State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 41 (holding that "until a trial court grants leave to file a motion for a new trial, the [untimely filed] motion for a new trial is not properly before the court.").

IV.

{¶12} In conclusion, because Struckman failed to show that he was unavoidably prevented from discovering the grounds underlying his new-trial

motion within the requisite time frame, we affirm the common pleas court's judgment.

Judgment affirmed.

WINKLER, P.J., and KINSLEY, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

Attachment D: C-210640

First Appellate District OPINION

August 17, 2022

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-210640 TRIAL NO. B-1502231
Respondent-Appellee,	:	
vs.	:	*OPINION.*
BUDDY STRUCKMAN,	:	
Petitioner-Appellant.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING
AUG 17 2022
COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 17, 2022

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Keith Sauter*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Buddy Struckman, pro se.

MYERS, Presiding Judge.

{¶1} Petitioner-appellant Buddy Struckman appeals the Hamilton County Common Pleas Court's judgment dismissing his petition under R.C. 2953.21 et seq. for relief from his 2018 convictions. We affirm the court's judgment.

{¶2} Struckman was convicted in 2018 of two counts of unlawful possession of a dangerous ordnance, specifically an automatic firearm and suppressor. He unsuccessfully challenged his convictions on direct appeal, *State v. Struckman*, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232, *appeal not accepted*, 159 Ohio St.3d 1446, 2020-Ohio-3712, 149 N.E.3d 523, and in a postconviction motion filed in 2020. *See State v. Struckman*, 1st Dist. Hamilton No. C-200069, 2021-Ohio-1043, *appeal not accepted*, 165 Ohio St.3d 1456, 2021-Ohio-4033, 176 N.E.3d 759.

{¶3} In this 2021 postconviction petition, Struckman seeks relief from his convictions, arguing that the state had either suppressed exculpatory evidence and/or knowingly misrepresented facts to the jury, and thus, violated his right to a fair trial. Specifically, Struckman contends that the contraband discovered during the search of the home located at 622 Maple Street led to a complaint against him in municipal court for possession of marijuana and drug paraphernalia and to a felony indictment for two counts of unlawful possession of a dangerous ordnance in the common pleas court. Although Struckman knew he had been acquitted of the drug charges following a bench trial, he maintains that he just recently discovered the reason for his acquittal, which was the municipal court's finding that "other people may have had access to the area where the drugs were found." Struckman claims that the state suppressed, at his felony trial, the fact that he had been acquitted of possession of marijuana and the basis for his acquittal as well a police report which documented officers observing other people in and out of 622 Maple Street in August 2016.

{¶4} To support his petition, Struckman submitted (1) the transcript from Struckman's trial in municipal court; (2) the mail log from the Ohio Department of Corrections indicating that Struckman had received the transcript in April 2021; (3) the affidavit supporting the municipal complaint for possession of drugs; (4) an excerpt from the transcript of the felony trial where Struckman had questioned a police officer about others seen near 622 Maple Street and about the creation of an August 2016 incident report; and (5) the August 2016 incident report, completed by a city of Lockland police officer, detailing Struckman's complaint that someone had broken into the house at 622 Maple Street and the officer's observation of several males in and out of the house around that time.

{¶5} In his appeal from the dismissal of his petition, Struckman advances three assignments of error that can be reasonably read together to argue that the common pleas court erred by dismissing his petition when he had demonstrated that he was unavoidably prevented from discovering the evidence on which he now relies to support his claims and where that evidence demonstrates substantive grounds for relief. We disagree.

No Jurisdiction to Entertain the Petition

{¶6} Struckman's 2021 postconviction petition was his second and was filed well after the time prescribed by R.C. 2953.21(A)(2) had expired. However, a common pleas court may entertain a late or successive postconviction petition if the petition satisfies the jurisdictional requirements of R.C. 2953.23. The petitioner must show either that he was unavoidably prevented from discovering the facts upon which his claim depends, or that his claim is predicated upon a new, retrospectively applicable federal or state right recognized by the United States Supreme Court since the time for filing his claim had expired. R.C. 2953.23(A)(1)(a). And he must show "by clear and convincing evidence that, but for constitutional error at trial, no

reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b).

{¶7} R.C. 2953.23 did not confer upon the common pleas court jurisdiction to entertain Struckman's late and successive postconviction claims. Struckman has not claimed that his postconviction claims are based upon a new and retrospectively applicable right recognized by the United States Supreme Court. And Struckman has not demonstrated that he was unavoidably prevented from discovering the evidence upon which he now relies. In fact, the evidence he attaches to his petition to support his postconviction claims was available to him prior to or at his felony trial. With respect to the transcript of the bench trial in municipal court and the affidavit underlying the complaint, both were available to Struckman, even if he did not gather the information prior to trial. And, he was present at all stages of the municipal court trial, having access to both the court's oral statements and its journal entries as well as the transcript. With respect to the excerpt from the transcript of the felony trial, this demonstrates that the August 2016 incident report was not suppressed but that Struckman had learned of it at trial and had the opportunity to access it at that time. Additionally, Struckman did not demonstrate that the state had suppressed the fact that he had been acquitted of the drug changes filed in municipal court where the municipal court judgment entry, showing a finding of not guilty of possession of marijuana and drug paraphernalia, was submitted as an exhibit at Struckman's felony trial.

{¶8} All the evidence which Struckman submits in support of his postconviction claims was either known or made known to him at the time of his trial, and thus, he cannot not show that the evidence was either suppressed or that he was unavoidably prevented from discovering the evidence upon which he now relies.

Conclusion

{¶9} Because Struckman failed to satisfy R.C. 2953.21's time requirements and R.C. 2953.23's jurisdictional requirements, the common pleas court properly dismissed his postconviction petition. We, therefore, overrule the assignments of error and affirm the judgment of the common pleas court.

Judgment affirmed.

WINKLER and BOCK, JJ., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

Attachment J: C-180287

First Appellate District OPINION

March 31, 2020

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-180287 TRIAL NO. B-1502231
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
BUDDY STRUCKMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 31, 2020

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *David Hoffmann*, Assistant Public Defender, for Defendant-Appellant.

MOCK, Presiding Judge.

{¶1} Following a jury trial, defendant-appellant Buddy Struckman was convicted of two counts of unlawful possession of a dangerous ordnance under R.C. 2923.17(A), namely an automatic weapon and a suppressor. He was also convicted of two specifications under R.C. 2941.144 that he had possessed an automatic firearm that was equipped with a suppressor. Struckman has filed a timely appeal from those convictions. We find no merit in his three assignments of error, and we affirm his convictions.

Factual Background

{¶2} The record shows that on April 20, 2015, Officer Drew Jones of the Lockland Police Department received a dispatch about shots fired in the area of Maple Street and Locust Avenue. Officer Jones had interacted with Struckman at a house located at 622 Maple Street, which was near to that area. He and his partner drove to that address to investigate.

{¶3} The officers received no response when they knocked on the door. At that time, they noticed security cameras attached to the house and became worried for their safety. The officers decided to call in the SWAT team. They also obtained a search warrant for the premises.

{¶4} When the SWAT team approached the front door, they saw Struckman on the first floor of the house near the front door. After they used "flash bangs," Struckman came out of the residence, and the SWAT team turned him over to the Lockland police officers. Then the SWAT team entered to search for any people or devices that would pose a threat to the police.

{¶5} After the SWAT team left, the Lockland police officers conducted their search. The only part of the house that appeared to be habitable was the second floor. The main living area was an eight-by-ten-foot room, a walkout front balcony. In the room, the police officers found a couch, a coffee table, a rug, a television monitor, and a microwave. They also found a garbage bag full of men's clothing, a suitcase, men's shoes, empty drink cups, and empty fast-food bags.

{¶6} Under the couch cushions, the officers found a .45-caliber handgun. There were nine rounds of ammunition in the gun's ten-round magazine. Other loaded magazines and a holster for the gun were also found in the room.

{¶7} The room had a small closet. Officer Jones found the closet door ajar, and there was evidence that the SWAT team may have forced open the door. The closet contained a suit jacket and men's dress clothes.

{¶8} The officers also found a locked safe inside the closet. Inside the safe, they found a .45-caliber MAC-10 machine gun, six loaded magazines of ammunition, a suppressor that fit the machine gun, and a detached stock. They also found approximately 600 rounds of .45-caliber ammunition. A firearm examiner from the Hamilton County Coroner's Office determined that the MAC-10 was a functioning fully-automatic weapon. He also determined that the homemade suppressor was made for that weapon.

{¶9} The officers waited several days to file charges against Struckman because they first wanted to contact federal authorities. When they came to arrest Struckman five days later, they found him at the house at 622 Maple Street, where they had previously interacted with him.

Weight and Sufficiency

{¶10} In his first assignment of error, Struckman contends that his convictions and the accompanying specifications were not supported by sufficient evidence and were against the manifest weight of the evidence. He argues that he state failed to prove that he had constructive possession of the automatic weapon and the suppressor. This assignment of error is not well taken.

{¶11} Struckman was convicted of two counts of unlawful possession of a dangerous ordnance under R.C. 2923.17(A), which states that "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance." Former R.C. 2923.11(K)(1) and (5) defined an automatic weapon and a muffler or suppressor as dangerous ordnances.

{¶12} To "have" a dangerous ordnance within the meaning of the statute, the offender must actually or constructively possess it. *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, 968 N.E.2d 27, ¶ 14 (1st Dist.). Courts have defined constructive possession as "knowingly exercising dominion and control over an object, even though the object is not within the person's immediate physical possession." *State v. English*, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, ¶ 32, citing *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. The person must be "conscious of the presence of the object." *Hankerson* at 91; *Williams* at ¶ 15. The state may prove dominion and control and consciousness of the object by circumstantial evidence. *Williams* at ¶ 15; *English* at ¶ 32.

{¶13} As to the specifications, former R.C. 2941.144 provided for the imposition of a six-year prison term if the indictment contained a specification that "the offender had a firearm that is an automatic firearm or that was equipped with a firearm muffler or suppressor on about the offender's person or under the offender's

control *while committing the offense.*" (Emphasis added.) This court has stated that in proving a specification, the state need not show that the defendant actually possessed a weapon, but instead may show constructive possession. *See State v. Jackson*, 1st Dist. Hamilton No. C-140178, 2014-Ohio-5008, ¶ 18-19. *Accord State v. Walker*, 10th Dist. Franklin No. 14AP-905, 2016-Ohio-3185, ¶ 63-64. In regard to the firearm specification in R.C. 2941.141, we stated that "the state does not need to demonstrate that the defendant used the firearm to commit a felony; all that is required is that the defendant have the firearm on or about his person or under his control 'at some point' during the commission of the crime." *English* at ¶ 28, quoting *State v. Harry*, 12th Dist. Butler No. CA2008-01-0013, 2008-Ohio-6380, ¶ 53.

{¶14} The state presented circumstantial evidence to show that Struckman was living on the second floor of the property at 622 Maple Street, where police found the dangerous ordnances. The other two floors of the house were uninhabitable. The first floor was under construction, and the third floor was used as a chicken coop. The house was owned at the time by Struckman's ex-wife. The police officers testified that they frequently encountered Struckman there. They knew him well due to complaints by the neighbors about him and his own complaints to police. On police reports he filed, Struckman listed his address as 622 Maple Street. Struckman's white Chevy truck was often parked outside. The officers had never seen anyone else at the house, and they had never known Struckman to stay anywhere else.

{¶15} On the day the shots were fired, the police officers and the SWAT team formed a perimeter around the house to prevent anyone from entering or leaving. Struckman was the only person found at the house. The second floor appeared to be lived in, and they found furniture, a microwave, a toaster oven, and fast-food

wrappers on the second floor, as well as weapons and ammunition. They also found men's clothing in the closet, along with the safe containing the automatic weapon and suppressor. The officers testified that the living area was quite small, approximately eight by ten feet.

{¶16} The officers waited several days to file charges against Struckman. When they came to arrest Struckman five days later, they found him at the house. No one else was present. On bond forms, he listed his address as 622 Maple Street.

{¶17} Thus, the state presented circumstantial evidence showing that Struckman was the only person who exercised dominion and control over the area where the dangerous ordnances were found and that he would have been conscious of their presence. *See State v. Finnell*, 1st Dist. Hamilton Nos. C-140547 and C-140548, 2015-Ohio-4842, ¶ 41-45; *State v. Brown*, 1st Dist. Hamilton No. C-120327, 2013-Ohio-2720, ¶ 43; *English*, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, at ¶ 28-29; *State v. Bailey*, 1st Dist. Hamilton Nos. C-060089 and C-060091, 2007-Ohio-2014, ¶ 35-40. The state also presented circumstantial evidence to show that Struckman had an automatic firearm and a suppressor under his control while committing the offenses.

{¶18} The record shows that a rational trier of fact could have found that the state had proven beyond a reasonable doubt all of the elements of the two counts of unlawful possession of a dangerous ordnance and the accompanying specifications. Therefore, the evidence was sufficient to support the convictions. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Brown* at ¶ 44; *Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, 968 N.E.2d 27, at ¶ 25-26.

{¶19} Further, after reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse

Struckman's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *Brown* at ¶ 45.

{¶20} Struckman presented witnesses who testified that Struckman did not live at 622 Maple Street in Lockland. But the jury did not find that evidence to be credible, and matters as to the credibility of evidence were for the trier fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *State v. Wright*, 2017-Ohio-1568, 90 N.E.3d 162, ¶ 59 (1st Dist.). Therefore, we overrule Struckman's first assignment of error.

Waiver of Counsel

{¶21} In his second assignment of error, Struckman contends that he was deprived of his Sixth Amendment right to counsel when his request for counsel during trial was denied. He argues that the trial court failed to obtain a waiver of counsel after his midtrial request for counsel. This assignment of error is not well taken.

{¶22} A criminal defendant's right to counsel during the critical stages of the prosecution is guaranteed by both the United States Constitution and the Ohio Constitution. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 22; *State v. Jackson*, 1st Dist. Hamilton No. C-180160, 2019-Ohio-2933, ¶ 5. Embodied in that right is a "correlative right to dispense with a lawyer's help." *Martin* at ¶ 23, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1943). A defendant in a state criminal trial has an independent constitutional right to represent him or herself at trial without counsel when the defendant knowingly, intelligently, and voluntarily chooses to waive

counsel. *Martin* at ¶ 24; *Jackson* at ¶ 5; *State v. Furr*, 1st Dist. Hamilton No. C-170046, 2018-Ohio-2205, ¶ 6.

{¶23} Crim.R. 44 governs the procedure for waiver of counsel in "serious offense" cases. A "serious offense" includes any felony. Crim.R. 2(C). Under Crim.R. 44(A), when a defendant is unable to obtain counsel, counsel must be assigned to represent the defendant in all stages of the proceedings, unless the defendant, after being fully advised of his right to counsel, knowingly, intelligently, and voluntarily waives his right to counsel. *Furr* at ¶ 7. The waiver must be made in open court and must be in writing. Crim.R. 44(C).

{¶24} The written waiver is not constitutionally required, so a trial court needs only to substantially comply with Crim.R. 44. *Martin* at ¶ 38; *Furr* at ¶ 8. A court substantially complies with Crim.R. 44 when it makes a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes the right to counsel. *Martin* at ¶ 39; *Furr* at ¶ 8.

{¶25} The trial court should explain to the defendant "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all the other facts essential to a broad understanding of the whole matter." *State v. Gibson*, 45 Ohio St.2d 366, 377, 345 N.E.2d 399 (1976); *Furr*, 1st Dist. Hamilton No. C-170046, 2018-Ohio-2205, at ¶ 9, The court must also inform the defendant of the disadvantages of self-representation and explain that the defendant will be required to follow the same rules of procedure and evidence that normally govern the conduct of a trial. *Furr* at ¶ 9; *State v. Murphy*, 1st Dist. Hamilton No. C-170390, 2018-Ohio-1063, ¶ 6.

{¶26} The defendant's assertion of the right to self-representation must be clear and unequivocal. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 72; *Furr* at ¶ 10. We review the propriety of a defendant's waiver of the right to counsel de novo. *Jackson*, 1st Dist. Hamilton No. C-180160, 2019-Ohio-2933, at ¶ 5; *Furr* at ¶ 10.

{¶27} Struckman's argument must be understood in the context of the entire proceeding, which took well over three years, mostly due to Struckman's issues with counsel. Originally, Struckman had retained counsel. Counsel asked to withdraw due to a breakdown in communication and Struckman's lack of cooperation. The trial court allowed counsel to withdraw and told Struckman that it would appoint counsel. Struckman asked, "Am I allowed to defend myself in this matter?" The court told him "it's not a very smart thing to do." The court asked Struckman a few questions about his issues with counsel, and engaged in a dialogue about the right to counsel and what would happen if Struckman chose to represent himself. The court ultimately said that it would not let Struckman make the decision until he considered everything. It appointed counsel, indicating, "I can change later."

{¶28} Struckman went through three or four more attorneys, all of whom withdrew because of a breakdown in communication. One of them filed a suggestion of incompetency, although Struckman was ultimately found competent to stand trial.

{¶29} Struckman asked the trial judge to recuse himself, and the judge did so. A new judge was assigned to the case. The court appointed another attorney for Struckman, but essentially told him it would be the last, stating, "You two are married." Counsel told the court that Struckman had asked him if he could "be co-counsel." Counsel had advised him "under Ohio law there is no such thing as co-counsel." The court agreed.

{¶30} Several months later, Struckman filed a pro se motion asking counsel to withdraw. Subsequently, he filed a pro se motion stating that he waived his right to counsel under Crim.R. 44 and chose to proceed pro se. At a hearing on his motions, counsel stated, "From day one, he has told me, and I believe that he has told some of his other attorneys, that he wanted to represent himself." The court then engaged in an extensive dialogue with Struckman about his experience with the criminal justice system, his competency, the nature of his problem with his attorney, his education level, the charges against him, trial procedure, sentencing, and other issues. The court stated it would take the issue under advisement. In the meantime, it advised Struckman to work with counsel and that "he blows you out of the water with regard to legal knowledge."

{¶31} Eventually, the court permitted counsel to withdraw. It told Struckman that he was making "a serious mistake," that he would have a "fool for a client," and that he was "absolutely treading on dangerous waters."

{¶32} The case proceeded to trial before a visiting judge on March 5, 2018. The court stated it was going to "take a few minutes to make sure that you are knowingly and willingly giving up your right to an attorney." It discussed Struckman's relationship with his previous attorneys and the reasons why he wished to represent himself. The trial court explained in depth the charges Struckman was facing, the rights he was waiving, what would happen during the trial, and what he would need to know if he represented himself. At the end, the court asked him what he wanted to do. Struckman replied, "I would like to represent myself and go forward with trial." The court presented Struckman with a written waiver of counsel form, telling him to read it before he signed it, and if he had any doubts or did not

understand anything, "then do not sign it and ask me questions." Struckman said he had no questions and signed it.

{¶33} Two days later, the court journalized an entry appointing standby counsel to represent Struckman. At the next hearing, counsel indicated that Struckman had sent him an email stating, "At this time I request to represent myself as pro se which was my original intention and goal." Struckman had also requested that counsel continue as standby counsel. Counsel stated that he and Struckman had had a breakdown in communication and that they fundamentally disagreed on how to proceed. The court again engaged in an extensive dialogue with Struckman about what it meant to represent himself. The court again had him sign a written waiver of counsel and determined that he had knowingly, voluntarily and intelligently waived his right to counsel.

{¶34} Struckman represented himself throughout the state's case. After the state had rested and he commenced presenting his case, Struckman's standby counsel informed the court that Struckman wanted him to take over Struckman's defense. Struckman confirmed this. This occurred on a Friday afternoon, so the court ended the proceedings early to allow counsel to prepare over the weekend.

{¶35} That Monday, counsel advised the court that he was not able to take over Struckman's defense due to his other commitments. The court asked Struckman if he wanted an attorney from the public defender's office to represent him. Struckman replied, "No, your Honor." The court indicated that "the trial is 80 to 90 percent complete. If you have a private attorney that you've hired to take over your representation, that, of course, will be permitted." Struckman said that he did not want one. He also said that he was comfortable with counsel remaining as standby counsel.

{¶36} The court then stated:

> And I just want to summarize with you, Mr. Struckman, as I told you when this trial started, you had the opportunity to tell me you wanted an attorney during the trial. While that's true, you know, this trial is 80 to 90 percent completed. * * * And you really can't expect [counsel] or somebody from the public defender's office or any attorney to step forward and take over when the trial is 80 to 90 percent completed. It's just not realistic.
>
> And it would put that attorney at a high risk of—well, making mistakes that he or she would be responsible for.
>
> So while I told you that you could change your mind at any time, that assumed that it would be a reasonable time and that people would be available.

Struckman did not object in any way. The court continued the case briefly to give Struckman time to prepare.

{¶37} It is this final exchange with which Struckman now takes issue. He argues that a new colloquy should have occurred to determine if he was voluntarily waiving his right to counsel and the court should have had him sign a new written waiver. But the record shows that, Struckman was informed many times of the dangers of representing himself and the rights he would be waiving. After counsel sought to withdraw, Struckman indicated that he did not want to have an attorney appointed for him or to retain one. He once again unequivocally stated that he wanted to represent himself. *See Jackson*, 1st Dist. Hamilton No. C-180160, 2019-Ohio-2933, at ¶ 6-10. He did not in any way indicate that he was revoking or rescinding his waiver of counsel or abandoning his right to self-representation. *See*

State v. Obermiller, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 31; *State v. Cook*, 2016-Ohio-2823, 64 N.E.3d 350, ¶ 90-92 (5th Dist.); *State v. Brown*, 4th Dist. Hocking No. 93CA20, 1994 WL 312905, *3 (June 29, 1994). In the context of the entire proceedings, it was obvious that he was again voluntarily waiving his right to counsel and representing himself. It was not necessary for the court to go through the whole colloquy yet again. *See Jackson* at ¶ 10.

{¶38} Further, at that time, Struckman's counsel indicated that he had had eight or nine attorneys, and he could not work with any of them. The right to counsel does not give an indigent defendant the right to counsel of his choice. Therefore, self-representation may be deemed voluntary where the court finds a valid waiver of the right to counsel due to the defendant's refusal to proceed with competent court-appointed counsel. *State v. Nelson*, 2016-Ohio-8064, 75 N.E.3d 785, ¶ 22 (1st Dist.). By rejecting appointed counsel so many times, Struckman "necessarily chose self-representation." *See id.* at ¶ 27. Under the circumstances, we overrule Struckman's second assignment of error.

Competency

{¶39} In his third assignment of error, Struckman contends that the trial court erred in finding him competent to stand trial. He argues that the trial court had originally found him incompetent to stand trial, but then relied on additional less-credible evaluations to find him competent. This assignment of error is not well taken.

{¶40} The test for determining whether a defendant is competent to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him." *State v.*

Were, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 45. A defendant is presumed competent to stand trial, and the burden is on the defendant to prove by a preponderance of the evidence that he is not competent. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 28.

{¶41} Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel. *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 29. Further, lack of cooperation with counsel is not sufficient indicia of incompetence to raise doubt about a defendant's competence to stand trial. *Id.* at ¶ 30.

{¶42} A trial court's finding that a defendant is competent to stand trial will not be disturbed when there is some reliable and credible evidence supporting that finding. *Were* at ¶ 46. Deference on those issues should be given "to those who see and hear what goes on in the courtroom." *State v. Cowans*, 87 Ohio St.3d 68, 84, 717 N.E.2d 298 (1999). Further, Struckman did not object to being found competent to stand trial and forfeited any error but plain error. *Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, at ¶ 52.

{¶43} Early in the proceedings, one of Struckman's attorneys raised the issue of incompetency. He noted that Struckman had told him he had had a concussion the day before. He stated that "based on that and the conversations we're having today, I believe I need to request a competency evaluation * * *." The court ordered an evaluation. That evaluation found that even though Struckman had never been diagnosed with a mental illness, he had a history of impulsiveness and poor decision making. It stated that he was not capable of understanding the nature and objective

of the proceedings or of assisting counsel in preparing for the defense. Therefore, he was incompetent to stand trial. Because Struckman disagreed with that finding, the court ordered a second evaluation.

{¶44} The second evaluation found him to be competent to stand trial. His counsel could not stipulate to that report because of his conversations with Struckman. He also felt like he had a conflict of interest because he might have to testify regarding competency. Consequently, the court permitted him to withdraw as counsel, appointed new counsel, and ordered a third evaluation.

{¶45} The third report also stated that Struckman was competent to stand trial. Both Struckman's new counsel and the state stipulated to that report. The court then found Struckman competent to stand trial. The trial court was entitled to rely on the opinions of the experts who conducted the second and third evaluations, rather than the first. Competent, credible evidence supported its decision that Struckman was competent to stand trial.

{¶46} At the hearings on both the second and third evaluations, the court also heard arguments about Struckman's motion for a reduction in bond. In arguing that the competency reports were not credible, Struckman relies on the prosecutor's arguments against a reduction which were based on all three psychiatric reports. The state used the information in those reports to show that Struckman was a threat to the public in relation to the bond reduction. That is a separate issue from whether he was competent to stand trial, and the prosecutor's comments were irrelevant to the issue of whether Struckman was competent to stand trial. As we have previously stated, incompetency should not be equated with mental instability or insanity. *See Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, at ¶ 9.

{¶47} Under the circumstances, we cannot say that the trial court erred in finding Struckman competent to stand trial, much less that it committed plain error. Therefore, we overrule Struckman's third assignment of error.

Summary

{¶48} In sum, we hold that (1) the evidence was sufficient to support Struckman's convictions for the two counts of possession of a dangerous ordnance and the accompanying specifications; (2) the convictions were not against the manifest weight of the evidence; (3) Struckman was not denied the right to counsel; and (4) the trial court did not err in finding him competent to stand trial. Consequently, we overrule his three assignments of error, and we affirm the trial court's judgment.

Judgment affirmed.

ZAYAS and BERGERON, JJ., concur.

Please note:

The court has recorded its own entry this date.